COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
NO. SJC-0E-085

IN THE MATTER OF THE BOSTON MUNICIPAL COURT
DEPARTMENT OF THE TRIAL COURT

Report of Special Master and Commissioner

Dean Paul R. Sugarman
Suffolk University Law School
41 Temple Street
Boston, MA 02114

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ACKNOWLEDGEMENT

When this task began, the only certainties were that it would consume a large block of time over a relatively brief period, and that it would involve the acquiring and sifting through huge volumes of information. Having in mind that the Order of the Supreme Judicial Court was not accompanied by a staff or a set of printed instructions on where, or how, to find such a staff, the job ahead appeared more formidable than one would care to imagine. This problem was soon solved by the presence of two people who made the endeavor possible. The first, W. Thomas Smith, Esq., my former law partner, a capable and experienced trial lawyer's trial lawyer who is not only highly intelligent and efficient, but when the pressures mount, unflappable. The second, Professor Marc G. Perlin of Suffolk University Law School who, in addition to his brilliance, and abilities as a teacher, is an accomplished scholar, author and researcher. Both Mr. Smith and Professor Perlin possess the insight, eye for detail, dedication and practical approach to problems that was required.

Without the efforts of Mr. Smith and Professor Perlin throughout the course of this study, the job could not have been done.

They have my utmost respect and gratitude.

PAUL R. SUGARMAN

I.

INTRODUCTION

1. Order Appointing Special Master and Commissioner

On October 3, 1990, the Supreme Judicial Court entered an Order (Appendix A) appointing a "Special Master and Commissioner to conduct a prompt and thorough administrative inquiry into alleged improprieties with respect to preferential treatment of attorneys by certain justices of the Boston Municipal Court." The Special Master and Commissioner was also ordered to file a report with his findings, conclusions and recommendations, and also to "...make such recommendations as he may deem appropriate to the [Court] with respect to indications or findings of misconduct, if any, on the part of any justice, officer or employee of the Boston Municipal Court." The Special Master and Commissioner was given the power to subpoena witnesses and to administer oaths.

This report is submitted pursuant to the Order of the Court.

2. The Boston Globe Series

Although not referred to in the Order, the action of the Court followed a series of five articles in the Boston Globe published on September 23, 24, 25, 26 and 27, 1990. (Articles appear as Appendix B.) The series prompted much media comment and attracted wide public attention. Four of the articles (September 23, 24, 25 and 26, 1990) referred to certain perceived practices at the Boston Municipal Court Department (hereafter "BMC"). Two of those articles (September 25 and 26, 1990) dealt

with those issues in depth. More specifically, the articles covered the so-called "jury-of-six sessions" at the BMC. In substance, they set out data purporting to establish that six attorneys described as "politically-connected" appeared frequently before three justices of the BMC (in cases over a five-year sample period, 1985-1989) and that the results achieved by those six attorneys before those three justices were better, by a substantial margin than those of other attorneys generally. The series put some emphasis on a numerical compilation of cases purporting to show a relationship between the six attorneys and the three judges in terms of better results.

The three BMC judges named were Chief Justice William J. Tierney, Associate Justice John A. Pino and Associate Justice Walter Hurley. Of the six attorneys named, one was a member of the State Senate (Michael LoPresti, Jr.). Three were members of the Massachusetts House of Representatives during the period covered by the Globe series (Michael F. Flaherty, Alfred E. Saggese, Jr. and Salvatore F. DiMasi), one a former Plymouth County District Attorney (Thomas E. Finnerty), and a former member of the Massachusetts Senate, House of Representatives and presently Associate Counsel to the Senate (George V. Kenneally, Jr.). Although there are some references to other judges and other attorneys, the emphasis was on the three judges and six attorneys referred to above.

The articles also set out certain anecdotal descriptions of and comments concerning specific cases which, according to the

series, tended, along with the other data, to establish preferential treatment.

Although the Globe series covered several matters involving the BMC and other courts, the Order of the Supreme Judicial Court appointing the Special Master and Commissioner referred to an "administrative inquiry into alleged improprieties with respect to preferential treatment of attorneys by certain justices of the Boston Municipal Court." Every effort was made to stay within the confines of the subject matter of the Order. For example, other matters reported by the Globe, including matters in other courts, work habits or bail fees, were not investigated. Indications or findings of misconduct that may have been uncovered during the course of the inquiry are, in accordance with the Order, reported.

Although the Globe series contained allegations prompting inquiry, this investigation was conducted independently with its own methodology.

3. Methodology of Investigation

This administrative inquiry began, using the Globe series of articles as a starting point. The reason was that the articles themselves contained specific allegations which needed investigation, and the articles raised other questions concerning the conduct of the BMC and certain of its personnel which

required answers. At first the inquiry concentrated on the three judges and six attorneys specifically named in the Globe articles. However, as will be set forth below, as the inquiry proceeded, a thorough review of all BMC judicial and many non-judicial personnel was conducted. Further, the inquiry focused almost exclusively on the BMC's criminal jury-of-six sessions. The Globe allegations were focused on these sessions, and as the inquiry proceeded, it became apparent for several reasons discussed in this report, that to the extent problems of the type this inquiry was commissioned to address existed, they would be most apparent in the jury sessions. Also, the inquiry did not consider matters arising from cases entered before 1985. The BMC tape library did not contain recordings of proceedings predating 1986 making investigation of such matters more difficult.[1] Also, the judicial personnel in the BMC were significantly different before 1985, making an inquiry into conduct before then less relevant to the present operation of the court. In addition the Globe generally used the period from 1985 to 1989 for its articles. Finally, some practical limitation in scope had to be considered.

The inquiry began with an attempt to understand the general operation of the BMC and, in particular, the jury sessions. A thorough review of the entire process was conducted. Each of the

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1 As discussed later in Section II. 16, the tapes had been erased in accordance with the applicable BMC rule.

specific cases mentioned in the Globe series where there was an allegation which was considered subject to this inquiry was reviewed and investigated. Then, as other matters were brought to the Special Master's attention, through testimony, interview, or review of dockets or tapes, these were followed up with a thorough investigation.

The techniques that were used during the course of the inquiry were:

1. Testimony under oath stenographically transcribed;
2. Informal interviews;
3. Examination of BMC docket sheets, case files and probation records of specific cases;
4. Examination of district attorneys' files and police records for specific cases;
5. Review of original BMC court tapes;
6. Review of BMC files, internal memoranda and regularly generated reports and statistics;
7. Statistical survey of BMC criminal cases with models and analysis generated with the assistance of a consultant;
8. Review of statistics and other documents maintained in the Office of the Chief Administrative Justice; and
9. Examination of BMC facilities and court sessions.

For each of these methods of inquiry, a brief description of the nature and extent of the investigation's activities follows.

Oral testimony under oath, stenographically transcribed, was taken from 55 witnesses comprising over 4,000 pages of testimony. Some witnesses were questioned several times. Testimony was taken on 37 separate dates. The witnesses included each of the 11 judges of the BMC sitting during the course of the inquiry, the Clerk-Magistrate for Criminal Business of the Boston Municipal Court and each assistant who works in the Boston Municipal Court jury-of-six session, representatives of the BMC Probation Department, BMC administrative personnel, the District Attorney for Suffolk County, his first assistant, 12 present and past assistant district attorneys who work or worked in the BMC jury-of-six sessions, each of the six attorneys identified in the Boston Globe series of articles in conjunction with the BMC and additional attorneys, court personnel, police officers and other witnesses.

In addition to taking formal testimony, the investigation conducted numerous informal interviews, both for background information, and to determine the need for testimony under oath. Persons interviewed informally included other judges not presently on the BMC, attorneys frequently practicing on the criminal side of the BMC, representatives of the MDC Police Department, the Chief Administrative Justice of the Trial Court and members of his staff, lawyers in private and public sectors, the Commissioner of Probation and many others.

The examination of BMC dockets and case files was carried out for several different purposes and by several methods.

Initially, the docket sheets and case files for each of the individual BMC jury-of-six cases reported upon by the Boston Globe in connection with allegations of preferential treatment were obtained and reviewed. Next, each docket and, where indicated, case file, for each case that Attorneys Flaherty, Finnerty, Saggese, LoPresti, DiMasi or Kenneally appeared in the BMC jury-of-six sessions for the period 1985 to mid-1990 was obtained and reviewed. In addition, where indicated, BMC probation department records were reviewed for specific cases. Finally, for the years 1988 and 1989, each docket sheet for each case in the jury-of-six sessions was reviewed. From this review, each case involving an offense of operating under the influence of an intoxicant (OUI) was abstracted for the purpose of the statistical analysis which is described below.

The Suffolk County District Attorney's office maintains daily reports for each BMC criminal jury-of-six case resolved each day. For the years 1985 through mid-1990, several thousand daily reports were sifted through to identify those of the six lawyers and other reports of interest. In addition, in excess of 60 entire case files from the District Attorney's office were selectively obtained and reviewed. A printout of the computer database of the District Attorney's office for cases in the BMC jury-of-six session was also obtained and reviewed. Finally, in several specific cases, as described more fully below, police department records including personnel court appearance records were obtained.

Review of tape recordings of BMC proceedings including calls of lists, assignments sessions, trials and dispositions was accomplished in several stages. First, tape recordings of those specific cases mentioned in the Boston Globe series were requested from the BMC tape librarians. Next, recordings were requested for cases selected based upon the review of dockets, case files and District Attorney's records. At this point, it became clear that the tape librarians were unable to locate recordings of proceedings in a substantial number of cases. There were several reasons for this. The practice more fully described later of clerks failing to record the tape and footage numbers on case files and the poor quality of the recordings made location of the proceedings difficult and time-consuming. Also, the tape librarians who were accustomed most frequently to search for full trials were asked in this inquiry to search not only for trials but also for calls of the list, dismissals and other brief encounters between counsel and judge. These, by their nature, are much more difficult to locate. Finally, it became apparent that some proceedings were not being recorded at all.

A team of three paralegals was set to work to search the tape library of the BMC with particular attention to recordings of certain judges. In addition, for two judges, tape surveys were conducted on a random basis for comparison purposes. Further, recordings of several entire days' proceedings were reviewed with corresponding trial lists for various reasons. All

together, tape recordings for 214 separate proceedings were searched out (not including recordings for any entire day). The number of proceedings actually found and reviewed was 125. No recording could be found for the remaining 89 BMC proceedings for which a search of the tapes was made. Due to the poor quality of the recordings of several specific proceedings that became the subject of particular interest in the investigation, technical services were obtained to electronically eliminate noise and enhance the quality of these specific recordings. Recordings of five different proceedings were enhanced in this fashion. Overall, the review of the BMC tape library was designed to sample the library for recording practices to see how proceedings were conducted generally and to follow through on questions that arose concerning specific cases.

Various additional documents were requested from the offices within the BMC. From the Chief Justice's office, trial lists, judges' assignment lists, internal memoranda regarding tape recording of proceedings and statistical information were reviewed. The entire file of the BMC tape librarians, including all memoranda of all tape requests from the public for several years were obtained and reviewed. In addition, letters and comments from attorneys and members of the public were received, reviewed, considered and are forwarded along with other matters concerning this inquiry. Such computer-generated statistics, as the BMC kept, were obtained and reviewed as well as the

statistical reports to the Office of the Chief Administrative Justice (hereafter "OCAJ"). The BMC budget was reviewed. Selected statistics kept by the Commissioner of Probation regarding the BMC were obtained and reviewed.

From the foregoing, it became apparent that no source could provide the numerical data necessary to compare the outcome of cases handled by the six lawyers named in the Globe series in front of the various BMC judges with outcomes in other similar cases handled by other attorneys in front of the same BMC judges. Therefore, each BMC jury-of-six docket sheet for the years 1988 and 1989 was examined (comprising about 13,000 docket sheets), and those that involved an offense of operating a motor vehicle under the influence of an intoxicant were abstracted for statistical analysis. This sample was chosen for reasons that are explained more fully in the full discussion of the statistical analysis. In addition, it became apparent that the services of a statistical expert were required. The abstracted data, together with similar data gathered for the six lawyers identified in the Globe series was computerized and statistically analyzed by Professor David Pfeiffer of Suffolk University. In addition, Professor Pfeiffer was consulted concerning the choice of the samples, information collected and conduct of the 1988-89 survey.[2]

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2 David Pfeiffer is a Professor and Chairperson of the Department of Public Management in the School of Management at Suffolk University. He has taught at Suffolk University since 1975. Before 1975, he taught

Overall, every attempt was made to follow through both by taking testimony and collecting data on every question that arose concerning specific cases. However, one caution that was observed should be noted. Every attempt was made to avoid second-guessing BMC judges. It was viewed as beyond the scope of this inquiry to retry cases by analyzing fact situations to determine if a different outcome may have occurred with a different judge, to correct errors of law, to intrude upon judicial discretion, and generally to avoid any chilling effect on judicial independence. This concern was properly articulated by several BMC judges. Every effort was made to avoid that chilling effect within the constraints of the mandate of the Order to conduct this inquiry. However, properly viewed, an inquiry directed at publicized allegations of preferential treatment by members of the judiciary should reinforce the tradition and ethical mandate of judicial independence.

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at Northeastern University and University of Rochester. He has been a visiting lecturer at the Harvard School of Public Health, Boston University, University of Massachusetts at Boston, U.S. Civil Service Commission and Massachusetts Higher Education in the Prisons Program. He has a doctoral degree in political science and masters degree in government. His particular specialties include policy analysis and quantitative and statistical analysis as it relates to government and political systems. See Appendix C for Professor Pfeiffer's full qualifications.

II.

HISTORICAL PERSPECTIVE, STRUCTURE, ORGANIZATION AND PRESENT OPERATION OF BMC

1. Brief History of the Boston Municipal Court and the District Courts

Since the reorganization of the trial courts of Massachusetts in 1978, the BMC has been a separate Department of the Trial Court, formally called the Boston Municipal Court Department of the Trial Court.[3] The BMC functions essentially as the District Court for certain portions of the City of Boston, hearing both civil and criminal matters within its jurisdiction. It also has a jury-of-six session for criminal cases which originate in its own primary court as well as in the other eight district courts in Suffolk County.[4] The court currently consists of eleven associate justices, one of whom serves as the Administrative Justice.[5] The other eight District Courts

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3 G.L. c. 211B, §1. Prior to court reorganization, the formal name of the court was the Municipal Court of the City of Boston. See G.L. c. 4, §7, clause Fifty-seventh.

4 These are the District Courts of Dorchester, Roxbury, South Boston, East Boston, West Roxbury, Charlestown, Chelsea, and Brighton.

5 G.L. c. 218, §50 and G.L. c. 218, §51A. An Administrative Justice is appointed by the Supreme Judicial Court from among the justices of the particular department and serves for a five-year term. G.L. c. 211B, §5. An Administrative Justice is frequently referred to in this report as Chief Justice.

located within Suffolk County, unlike the BMC, are part of the District Court Department of the Trial Court.

The history of the modern BMC can be traced back to its creation in 1866, when it acquired both criminal and civil jurisdiction from the Boston Police Court.[6] It was during this period, the latter half of the nineteenth century, that the legislature began to replace Police Courts in the various cities and towns of the Commonwealth with individual District Courts.[7] By 1920, the last remaining Police Courts were abolished and were renamed District Courts.[8] Thus, the stage had been set for the current model in which individual District Courts exercised both civil and criminal jurisdiction within a defined territorial area throughout the state, except in the City of Boston, where jurisdiction was divided between the BMC and other district courts.

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6 W. Davis, History of the Judiciary of Massachusetts 208-209 (1900); A. Dimond, The Superior Court of Massachusetts: Its Origin and Development 21 (1960); Bolster, "The Municipal Court Its Origin, Development and Practice Before It," 23 Mass. L. Q. 1 (1938).

7 McDermott, "The Development of the Massachusetts District Courts, 1821 to 1922," 15 Hist. J. of Mass. 154, 160-161 (1987). Apparently, the term "district" was adopted because the Police Courts from individual cities and towns were abolished and consolidated into a newly-created district court covering those municipalities.

8 McDermott, "The Development of the Massachusetts District Courts, 1821 to 1922," 15 Hist. J. of Mass. 154, 161 (1987).

The beginnings of a unified District Court system can be traced to the creation in 1922 of an Administrative Committee of District Court judges. The members of the Administrative Committee served in an advisory capacity to recommend uniform procedures and rules for the then-separate District Courts, each of which had its own Presiding or First Justice.[9] Although having district court jurisdiction, the BMC was not part of this scheme.

The independent nature of the then 72 District Courts (omitting the BMC) coupled with the growth of District Court civil and criminal business resulted in the organized bar and the legislature paying significant attention to the workings of those courts. This resulted in the production of a number of studies of the District Court system beginning in the 1930s.[10] Although

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9 McDermott, "The Development of the Massachusetts District Courts, 1821 to 1922," 15 Hist. J. of Mass. 154, 161 (1987); Bamford, "The Latest Discussion of District Court Problems," 25 Mass. L. Q. 1 (1940).

10 See, for example, Tenth Report of the Judicial Council of Massachusetts 10 (1934); Report of Special Commission of 1935 on Investigation of the Judicial System, as reproduced in 21 Mass. L.Q. 13 (1936); Report of the Committee of the Judiciary of its Investigation and Study of the District Court System, as appearing in 23 Mass. L. Q. 3 (1938); Report of the Joint Special Committee Consisting of the Members of the Committee on the Judiciary Concerning the District Court System of the Commonwealth, as appearing in 26 Mass. L. Q. (Temp. Supp.) (1941); Urbano, "Summary of the District Court Survey Committee's Report with Draft Act," 37 Mass. L. Q. 25 (1952).

One report in the 1930s, apparently recognizing the common nature of the District Courts located in Suffolk County and the BMC and the unequal burdens

certain of these studies gave some attention to the BMC, there appeared to have been an attitude that the District Court system

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among those courts, recommended that the Suffolk County District Courts be merged into the BMC:

> The nine District Courts of Suffolk County present a separate and individual problem. Although each is an independent court, with ample facilities, the mass of business has been concentrated in one court, the BMC. The result has been that the central court is swamped with cases, while a relatively small number are brought into the outlying courts.
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> The Commission recommends, therefore, that the District Courts of Brighton, Charlestown, Chelsea, Dorchester, East Boston, Roxbury, South Boston and West Roxbury, and the Boston Municipal Court, be combined into one court, to be known as the Boston Municipal Court. We also recommend that the powers of the chief justice of the present Boston Municipal Court shall be extended to include the jurisdiction of the new court, and that he shall be authorized by rule to assign both cases and judges to any court within the district.

Commission on Public Expenditures, Massachusetts Bar Association, Report of the Commission on Public Expenditures Relative to the District Courts, as reproduced in 19 Mass. L. Q. 28 at 33 (1934).

Similarly, a 1956 report recommended that the eight District Courts in Suffolk County be merged into the BMC:

> We are of the opinion that the courts in Suffolk County should all be eventually a part of the BMC. Suffolk County contains what amounts to the Commonwealth's only real metropolitan district. Its problems are to a great extent different from those of the rest of the district courts.

Report of the Judicial Survey Commission," 41 Mass. L. Q. 34, 68(1956).

and the BMC were separate and distinct. The reasons for this are unclear. In any case, far less formal attention appeared to have been given to the BMC.[11]

Although the BMC historically had its own Chief Justice to perform administrative functions and make assignments of judges,[12] the District Court system had no central administrative structure (other than the Administrative Committee) from the 1920s until the creation of the office of the Chief Justice of the District Courts in 1963. The District Court Chief Justice was, by statute, given "general superintendence of all the district courts," and succeeded to the powers formerly held by the District Court Administrative Committee.[13] After the creation of the office of the Chief Justice of the District Court in 1963, and until court reorganization in 1978, various reforms culminated in the vesting of increased administrative and

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11 The BMC did not avoid its share of criticism. See S. Bing and S. Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston (1970) (hereinafter, "The Quality of Justice)." The authors noted the isolation and separation of the BMC from the District Courts and concluded that there was little rationale to justify the continued independence of the BMC from the District Courts.

12 G.L. c. 218, §50 and c. 218, §52. The Chief Justice of the BMC held a tenured commissioned judicial office and in effect served as presiding judge of the court. Opinion of the Justices, 271 Mass. 575 (1930).

13 G.L. c. 218, §43A, as it existed in 1963. See Flaschner, "The District Courts of Massachusetts--A Current Overview," 56 Mass. L. Q. 333 (1971).

managerial powers over the various District Courts in the office of the Chief Justice of the District Courts.

One significant difference between the administrative functions of the Chief Justice of the District Courts and the Chief Justice of the BMC which existed until recently concerned the authority to promulgate rules of procedure. When the office of the Chief Justice of the District Court was created in 1963, the Chief Justice was given, by statute, the power to make and promulgate rules of procedure to govern District Court proceedings.[14] With court reorganization in 1978, the rule-making power was given to the Chief Justice of the District Court Department, subject to the approval of the Supreme Judicial Court.[15] However, rule-making power in the BMC was exercised collegially by all of the justices of the BMC until 1989.[16] In 1989, legislation was passed which transferred the rule-making power from the justices to the Chief Justice of the BMC, thus making the rule-making process of the BMC similar to that in the

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14 G.L. c. 218, §43, as it then existed.

15 G.L. c. 218, §43, as amended by St. 1978, c. 478.

16 G.L. c. 218, §50, as it existed prior to amendment by St. 1989, c. 482. G.L. c. 218, §50 was amended by the Court Reorganization Act in 1978, St. 1978, c. 478, to make the justices' rule-making power subject to approval of the Supreme Judicial Court.

District Courts. [17]

2. Efforts to Reorganize the Courts

Re-examination of the operations and efficiency of the Massachusetts court system was a significant issue for bench and bar during the 1970s. By this time, the trial courts were composed of 72 separate district courts, the BMC, the Superior Court, Probate Court, Housing Court, Land Court, Juvenile Court, all operating independently with over 400 separate budgets and little, if any, central management.

Various groups studied this matter prior to the passage of a court reorganization act in 1978, producing much controversy, disagreement, and ultimately, compromise.

In 1976, a special Committee on Court Reform of the Massachusetts Bar Association (M.B.A.) recommended a complete restructuring of the trial courts into "a unified single trial court and a system of central administration and funding."[18]

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17 G.L. c. 218, §50, as amended by St. 1989, c. 482. The 1989 change did not make rule-making exactly the same in both departments. The power of the Chief Justice of the BMC to make rules is subject to the approval of both the Chief Administrative Justice of the Trial Court and the Supreme Judicial Court. There is no comparable statutory provision for District Court rules which requires approval of the Chief Administrative Justice.

18 Recommendations and Final Report of MBA Committee on Court Reform, as appearing in 61 Mass. L. Q. 129 (1976).

This plan would have combined the Superior Court, District Courts, BMC, Probate Courts, Housing Courts, and Land Court into a single-tiered trial court. Other recommendations of the 1976 M.B.A. Committee addressed the need for centralized management of the court system; unitary state budgeting for the court system, thus eliminating the approximately 400 separate court budgets; giving the courts the power to redraw judicial districts allowing them to take into account demographics and resources; giving the courts power to transfer personnel; and the abolition of the criminal trial de novo system.

Also in 1976 a report was issued from the Governor's Select Committee on Judicial Needs, entitled "Report on the State of the Massachusetts Courts." This report, often referred to as the "Cox Report" (the Committee was chaired by Professor Archibald Cox) concluded that the "administration of justice in Massachusetts stands on the brink of disaster" and asserted that the court system must be reorganized to avert "a breakdown of justice." [19] Among the recommendations of the Cox Report were: (1) consolidation of the Probate Courts, Housing Courts, and Land Court with the Superior Court into a single tier under one Chief Justice; (2) abolition of the BMC as a separate entity by consolidation of the District Courts and the BMC into a second

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19 A summary of the Cox Report and the full text of the report may be found at 62 Mass. L. Q. 23 (1977).

tier under one Chief Justice[20]; and (3) elimination of the system by which criminal cases could be tried de novo in the Superior Court after a bench trial in the District Courts or the BMC.[21]

Following publication of the Cox Report, the Judicial Council issued a special report in which it recommended against merger of the District Courts and the BMC, although it further stated that in the event the various District Courts were to be combined into a single District Court, then it would be logical to include the BMC in the new District Court.[22]

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20 With respect to the functioning of the BMC, the Cox Report commented at p. 8:

> Despite the equivalence of the Boston Municipal Court and the district courts in jurisdiction and status, the Boston Municipal Court operates as a separate institution. When its Chief Justice and the Chief Justice of the district courts maintained a cordial working relationship on a personal basis, a cooperative working relationship existed between the chief justices of the two sub-systems and coordinated rules and practices were established. Absent such a relationship, there was no effective coordination.

21 In place of trial de novo in the Superior Court, the Cox Report recommended that a defendant charged with a District Court crime "should be offered an election between an immediate jury trial and an immediate bench trial subject to his right to claim a new trial with a six-person jury in the District Court."

22 "The Time Has Come to Act," A Special Report of the Judicial Council of Massachusetts (January 1977). The complete text of this portion of the report of the Judicial Council (at pages 60-61) may be characterized more appropriately as equivocal on the issue of merger:

> While the Boston Municipal Court is not now part of the District Court system, there has been

3. The Court Reorganization Act of 1978

In 1978 the legislature responded to the drive for reform by reorganizing the trial courts of Massachusetts into departments of a unified trial court, known as the Trial Court of the Commonwealth.[23] Each of the then-existing independent court systems thereby became departments within the Trial Court. Thus, effective in 1978, the previously independent Boston Municipal Court became the Boston Municipal Court Department and the previously independent District Courts were combined into the

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> a high degree of cooperation and uniformity of policy and practice between the B.M.C. and the other District Courts, particularly during the current administration of Chief Justice Lewiton. There have been occasional suggestions in the past that the B.M.C. be placed under the general administrative authority of the Chief Justice of the District Courts, as are the other 72 District Courts of the Commonwealth. However, because of the unique administrative problems of the B.M.C. and the progressive administration of that court, we believe that such a change would merely add to the administrative burdens of the Chief Justice of the District Courts, with no compensating advantages. This was also the view of the late Chief Justice Flaschner, who made it clear that he did not advocate or favor such a move.
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> On the other hand, if all of the District Courts of the Commonwealth were to be merged into a single "District Court of Massachusetts" the inclusion of the Boston Municipal Court in that single court would appear to be a logical step.

23 G.L. c. 211B, as added by St. 1978, c. 478. The establishment of the Trial Court and its constituent departments can be found in G.L. c. 211B, §1.

District Court Department. An Administrative Justice, appointed by the Supreme Judicial Court, would preside over each department, and a Chief Administrative Justice, also appointed by the Supreme Judicial Court, would preside over the entire Trial Court.[24]

The incumbent Chief Justices of the courts which existed prior to reorganization, however, were "grandfathered" in their positions and automatically became the Administrative Justice for the department which was the successor to their court.[25] The key recommendations of the two 1976 court studies--the 1976 Massachusetts Bar Association Committee on Court Reform, proposing consolidation of all trial courts into one unified court and the Cox Report, proposing consolidation of the Probate, Housing, Land, and Superior Courts into one court and consolidation of the BMC and the District Courts into a separate court -- were rejected in favor of retaining the identity of each

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24 G.L. c. 211B, §1. The Administrative Justice for each department is selected from among the associate justices of that department by the Supreme Judicial Court and holds that office for a five-year term. G.L. c. 211B, §5. The Chief Administrative Justice of the Trial Court is selected by the Supreme Judicial Court for a seven-year term after a nomination process engaged in by the Trial Court justices. G.L. c. 211B, §6. The duties of an Administrative Justice and the Chief Administrative Justice are set forth in G.L. c. 211B, §10 and G.L. c. 211B, §9, respectively.

25 St. 1978, c. 478, §332.

trial court, albeit under the guise of a department of the Trial Court.

The Court Reorganization Act of 1978 gave to the Chief Administrative Justice of the Trial Court the power to assign a judge of any trial court department to sit in any other department or location for the purpose of promoting "the speedy dispatch of judicial business," provided that the preference of the judge involved and the specialized functions of the particular trial court departments are taken into account.[26]

The Cox Report also recommended that the power to supervise and transfer non-judicial and non-elected personnel and employees of the court system be vested in the Chief Justice of the Supreme Judicial Court as the executive head of the judicial branch. When the court reorganization legislation was enacted in 1978, this recommendation was not adopted. Rather, power was given to the Chief Administrative Justice of the Trial Court to make such assignments subject, however, to the approval of the Administrative Justice of the department, the first justice of

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26 G.L. c. 211B, §9. Although there is no requirement or prior approval of the Administrative Justice, the Administrative Justice may report to the Supreme Judicial Court any such assignment order of the Chief Administrative Justice "which, in the opinion of such administrative justice, impairs the orderly operation of his department." G.L. c. 211B, §9(iii).

the division, or the clerk out of whose court or office the person would be assigned.[27]

The procedure adopted for the assignment of judicial personnel appears to add, in practice, another layer of approval. The cumbersome procedure required for the assignment of non-judicial personnel may account for the reason why such assignments are rarely, if ever, made. In addition, there is no power in the courts to redraw judicial districts to take into account changing demographics, resources or needs or otherwise to consolidate facilities. Nor were the courts given broad management authority to re-allocate funds during the fiscal year.

4. The Trial De Novo System

A brief overview of the criminal jurisdiction of the BMC and the de novo system follows.

a. Criminal Jurisdiction of the District Courts and BMC

With some exceptions, the District Courts and BMC have original jurisdiction to hear trials of most misdemeanors and "less serious" felonies, i.e., those punishable by imprisonment in the state prison for not more than five years.[28] Criminal

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27 G.L. c.211B, §9 (iii). The statute also provides that "in no event shall any such transfer be more than a reasonable distance from the place where such personnel is appointed, assigned or employed."

28 G.L. c. 218, §26. This jurisdiction is concurrent with the Superior Court.

cases are commenced by a complaint filed in the judicial district where the crime allegedly was committed. [29] In a District Court or BMC criminal case in Massachusetts, a defendant, who has a right to trial by jury by virtue of both the United States and Massachusetts Constitutions and statutory entitlement,[30] will have the choice of obtaining trial by jury either in the first instance or by means of a trial de novo after a District Court (or BMC) bench trial.

b. Trial De Novo Prior to 1979

Prior to 1979, a defendant in a District Court or BMC criminal case would first have the case heard in a bench trial in the District Court or BMC. Only after conviction would the defendant be able to claim a de novo trial, before a jury if desired, with the de novo trial occurring in the Superior Court, where issues of both law and fact would be determined anew.[31]

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29 G.L. c. 218, §26. See Mass. R. Crim. P. 3(a).

30 U.S. Const. amend. VI; Art. XII, Massachusetts Declaration of Rights; G.L. c. 263, §6 and c. 218, §26A.

31 For explanations of how the two-tier system operated, see the Cox Report at 30-31; The Quality of Justice at 1-4; Report of the Committee on Juries of Six to the Chief Justice of the District Court Department: "Elimination of the Trial De Novo System in Criminal Cases" (1984). The latter traces the de novo system back to a period in history where a defendant who committed a minor criminal offense would receive "rough justice" by means of a quick hearing before a local tribunal as a method to keep the peace in the community, and if convicted, have the option of a formal trial thereafter before a higher tribunal.

c. Trial De Novo Changes of 1979

By legislation effective in 1979, the recommendation of the Cox Commission concerning abolition of trial de novo in the Superior Court was adopted and the second tier of the de novo system was transferred from the Superior Court to the District Court Department and the BMC Department.[32] However, trials would be by juries of six rather than twelve. Thus were established jury-of-six sessions in the District Courts and the BMC for the purpose of hearing de novo appeals from the "primary court."[33]

(footnote, continued)
See McHugh, "Fair and Swift Justice: An Interview with Samuel E. Zoll, Chief Justice of the District Courts of Massachusetts," 28 Boston B.J. 13 (1984).

32 G.L. c. 218, §27A. See Commonwealth v. Duquette, 386 Mass. 834, 837 (1982).

33 G.L. c. 218, §27A. Actually, jury-of-six sessions in the District Courts and BMC pre-dated the 1979 abolition of de novo appeal to the Superior Court. In the District Courts, jury-of-six sessions "were first authorized in 1964 by an act of the Legislature as an optional form for de novo appeals to the Superior Court in Worcester and were thereafter expanded to Norfolk and Middlesex Counties." Sherman, "The District Court Department of the Massachusetts Trial Court--Then, Now and Prospects for the Future," 24 New Eng. L. Rev. 730 (1990). In the BMC, a jury-of-twelve session was established in 1974 pursuant to legislative authorization as an alternative to de novo appeals to the Superior Court in Suffolk County. Eighteenth Annual Report to the Justices of the Supreme Judicial Court by the Executive Secretary as of June 30, 1974.

After the 1979 reform, technically all District Court and BMC cases were to be tried before a jury of six unless the defendant filed a written waiver and consent to be tried without a jury. G.L. c. 218, §26A. If the waiver and consent were filed, the defendant would proceed to a bench trial, and thereafter, would

In addition, as also recommended by the Cox Report, this legislation gave a District Court or BMC defendant the option to claim a "first instance" trial in a jury-of-six session.

With regard to the location of jury-of-six sessions, the BMC was authorized by statute to hear de novo appeals and first instance jury trial requests in criminal cases originating in the BMC primary court or in any of the other eight District Courts located within Suffolk County.[34] The Chief Justice of the District Court Department is required to designate at least one division in each county for jury-of-six cases, with the exception of de novo appeals or first instance jury requests from the District Courts in Suffolk County.[35] In the case of de novo appeals or first instance jury requests from the Suffolk County District Courts, jury-of-six trials are to be held in the BMC jury-of-six session, or with the approval of the Chief Justice of the District Court, in any Suffolk County District Court.[36] As

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(footnote, continued)
be entitled to a trial de novo before a jury of six. G.L. c. 218, §27A.

34 G.L. c. 218, §27A (a).

35 G.L. c. 218, §27A (b).

36 G.L. c. 218, §27A (b). Although past practice has been for all de novo and first instance jury requests from the Suffolk County District Courts to be lodged in the BMC jury-of-six session, this provision would allow the Chief Justice of the District Court Department to create jury-of-six sessions in any of the Suffolk County District Courts to hear jury cases from those District Courts. Thus, the current practice of having all jury cases from the Suffolk County District Courts heard in the BMC could be altered by administrative

will be seen by examples covered later in this report, this legislative decision to feed jury cases from all Suffolk County district Courts into the BMC has led to numerous problems.

d. The Debate over Abolition of De Novo

No summary of the criminal de novo system would be complete without mention of the current debate over the abolition of trial de novo. No attempt will be made in this report to delve in detail into the many arguments, both pro and con, on the merit or lack of merit of the current system. However, the arguments in favor of abolition of trial de novo are compelling.

The de novo system adversely affects the quality of justice in the District Courts and the BMC by distorting the sentencing process.[37] Greater adherence to rules of substantive law and

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(footnote, continued)
action of the Chief Justice of the District Court without the need for additional legislation. It would thus be possible by administrative action to limit the cases to be heard in the BMC jury-of-six session to de novo appeals from the BMC primary court or first instance jury trial requests in cases commenced in the BMC primary court. There is presently under consideration a proposal which would create a jury-of-six session in the Dorchester District Court for certain types of cases.

37 For example, a judge in the primary court may enter a lighter sentence than warranted in the hope that the defendant will not appeal and overburden the system. On the other hand, a harsh sentence may be imposed because the judge knows that the defendant may avoid the sentence by a de novo appeal. Report of the Committee on Jury-of-Six to the Chief Justice of the District Court Department: "Elimination of the Trial De Novo System in Criminal Cases" at 22 (1984).

procedure is likely with a one-trial system with normal appellate review.[38] The use by some attorneys of the "first tier" trial as a dress rehearsal for the real trial will be eliminated, thus improving the quality and morale of all participants.[39] The delay and paperwork associated with a two-trial system will be decreased. [40] Although some commentators have argued for the retention of the de novo system because it offers the defendant an opportunity for discovery, a one-trial system with guaranteed pre-trial discovery could serve to satisfy this need. Also of interest is the fact that the number of first instance jury requests has increased to the point where now two-thirds of the cases in the BMC jury-of-six session represent first instance jury claims. In sum, as has been expressed by others, a system that grants one trial to a murderer but two trials to a minor offender is difficult to justify.

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38 Report of the Committee on Jury-of-Six to the Chief Justice of the District Court Department: "Elimination of the Trial De Novo System in Criminal Cases" at 23 (1984).

39 Id. at 23.

40 Id. at 24; Cox Report at 31. This inquiry has also revealed that the de novo system burdens both victims and witnesses who must appear for two separate trials.

5. Budget and Physical Facilities of BMC

The BMC, during this inquiry, had a total of 167 employees, in addition to the 11 judges.[41] The present number of authorized positions in the BMC staff is 185 and before fiscal year 1988 the number of authorized permanent positions was 209. The BMC's appropriations for the past five years were:

Fiscal Year	Appropriation
1985	$4,191,758
1986	$4,425,184
1987	$4,388,405
1988	$5,050,000
1989	$5,370,655
1990	$4,912,122[42]
1991	$4,800,000[43]

The Court is housed exclusively in the New and Old

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41 Layoffs during the course of this inquiry have reduced this number.

42 The original FY 1990 appropriation was supplemented to 5,193,434.

43 This amount was originally 5,000,000 but reduced by 4% by the legislature.

Courthouses in Suffolk County.[44] The BMC is located mostly located on the third floor of the Old Court House and fourth floor of the New Courthouse which connect. The Court does have other space such as the 5th floor New Courthouse Probation Office, Courtroom 100 on the ground floor of the New Courthouse and storage and office space on the Mezzanine of the Third Floor of the Old Courthouse. The Court has eleven courtrooms. Of these, three are used for jury trials.[45]

The BMC's facilities have several apparent defects.[46] The overall conditions are deplorable and include falling plaster due to leaks (as in the Judges' library and tape storage office), inadequate and undependable heating and ventilation, little air conditioning, poor lighting and unsuitable restroom facilities. In addition, the layout of the BMC creates difficulties. Conferences with counsel and even judges are held in spare jury rooms, ante rooms and even the Court Officers' locker room. The Judges' lobby consists of partitioned cubicles rather than offices. The BMC judges thereby are provided little privacy and

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44 On a temporary basis, the Court has held one or two civil sessions in Cambridge.

45 During much of the period covered by this inquiry, 1985 to present, only two jury courtrooms were availble, as Courtroom 100 is a recent addition to the BMC.

46 No effort was made to analyze fully the space and facilities needs of the BMC. The observations presented herein were made incident to other functions of the inquiry.

are inhibited from carrying on private conversations from their "offices." Further, the location of the Judges' Lobby and various Courtrooms requires that the judges walk (accompanied by a court officer) to and from courtrooms through the central hallway used by the public. This arrangement is uncomfortable for the judges and also raises potential personal security considerations. The BMC jury session clerks' office consists of three office-sized rooms housing about eight staff members in addition to dockets, files and public counter. More space is needed for this function. The facilities of the BMC and their condition are such as to detract from the dignity of the court and add to whatever other problems exist.

6. Case Load of BMC

During the period 1985 - 1989, the number of cases entered in the BMC in various categories has been:[47]

Fiscal Year	1985	1986	1987	1988	1989
Civil	37,726	42,138	27,790	29,754	30,291
Criminal					
Primary Ct. Motor Vehicle	5,221	4,555	2,545	3,730	3,805
Other Criminal	12,912	12,536	11,593	12,132	13,528
Jury Trial 1st Instance	1,525	1,894	2,041	2,451	2,487
De Novo	1,274	1,367	1,263	1,615	1,525

The above case load has, during the period been the responsibility of the judges appointed to the BMC. The total authorized number of judges is 11. However, during this period, the judges have been assisted by one, or at times two, recall judges sitting only on civil remand cases. Also, during this period, there have been substantial periods of time when the BMC had less than its full statutory complement of judges. For example, in May 1988, one judge retired and was not replaced for one year, and in February of 1989, another judge was moved to the

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47 Annual Reports of the Massachusetts Trial Court, 1985 through 1989. The numbers report defendants, not multiple charges.

Superior Court but was not replaced until December 1989. A third judge was on maternity leave during a portion of 1989, leaving the BMC short three judges for the better portion of a year. Despite this load, no assignment of judges from other courts to the BMC has occurred, nor during the time period in question has any formal request for such assignment been made by the BMC. The Chief Administrative Justice has the authority to assign judges from other departments of the Trial Court, as well as other personnel, such as assistant clerks. However, the process for making those assignments has potential statutory obstacles, and as far as the BMC is concerned, has seldom been exercised. If it were to occur, it would require the cooperation of the Office of the Chief Administrative Justice, the BMC, the transferring department and the persons involved.[48]

One measure used by the district courts in judging case load and efficiency is "dispositions per judge day." This measure divides the total number of dispositions for a given annual quarter in a court's jury trial session by the number of "judge days" for that quarter. "A judge day" is defined as a day in which a judge spends at least half the day presiding over criminal jury of six matters. Using the "dispositions per judge

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48 See Section II. 3.

day" measure to compare the BMC to the four busiest district court jury-of-six sessions, the comparison is as follows:[49]

Quarter		BMC[50]	Cam-bridge	Spring-field	Wor-cester	Dedham	Average of all Disrict Courts (Excludes BMC)
1988	1st	3.89	7.24	5.15	9.82	5.47	4.85
	2nd	3.26	5.47	5.13	8.17	4.83	4.33
	3rd	3.59	8.61	4.70	8.53	4.32	4.70
	4th	5.44	8.36	7.28	9.35	5.37	5.08
1989	1st	3.77	7.19	5.97	10.02	6.18	5.21
	2nd	6.23	6.03	4.21	10.78	5.33	4.64
	3rd	4.88	5.84	3.73	9.54	9.59	5.72
	4th	5.49	6.40	3.83	10.70	5.21	4.64
1990	1st	5.19	5.07	3.70	11.78	4.72	4.90
Average		4.64	6.69	4.86	9.85	5.67	4.90

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49 The District Court statistics come from District Court Management Information Reports, "Jury of Six Caseload" for the periods referred to; the BMC statistics were received from the BMC. The BMC ranks with Worcester and Springfield as the busiest.

50 These figures include the BMC Assignment Session. If the BMC Assignment Session is excluded, the numbers would be somewhat higher. Since the assignment session is part of the jury-of-six program, there is no reason why it should be excluded. In fact, the BMC statistics on dispositions include many cases which are finally disposed of in the assignment session. There is no good reason to include the dispositions without taking into account the judge responsible for the dispositions. This explanatory note is made due to the fact that this inquiry was provided with data computing the results both with and without the Assignment Session included.

For the period covered, the BMC ranks last among the five busiest courts and just below the statewide average for all District Courts.

7. Administrative Structure of BMC

Administratively, the BMC is headed by Chief Justice William J. Tierney. There is an administrative department headed by Helen Quigley, Executive Secretary to the Chief Justice. The BMC tape librarians, Arthur Cerniglia and Sheila Day, report to Helen Quigley, as part of this department. In addition, the Court's secretarial and computer records personnel are part of this administrative department.

There are two separate clerk's offices for the BMC, one for civil and one for criminal business. Each is headed by its own Clerk-Magistrate appointed by the Governor. Personnel including assistant clerks and office clerical staff work solely for one office or the other. The Clerk-Magistrate for Criminal Business is Francis Sheils. The Criminal Clerk's office is divided into two separate offices, one for the primary court and a separate office for the jury-of-six sessions. Each has its own First Assistant Clerk: Robert Block for the Primary Court; and Rosemary Carr for the jury-of-six sessions. Each of these separate criminal clerk's offices maintains physically separate facilities with separate personnel, docket systems, filing systems and computer capability. However, with one exception, the assistant clerks (courtroom clerks)

rotate through both the primary court and jury trial sessions. By statute, the assistant clerks are appointed by the Clerk-Magistrates with the approval of the BMC judges. This statutory management scheme has the potential for dividing loyalties, confusing goals, reducing accountability and inhibiting management flexibility.[51]

8. BMC Probation Department

The BMC Probation Department is headed by John Tobin, who is appointed by the Chief Justice of the BMC and has a staff of 51 persons.[52] There are four probation officers who are primarily assigned to the jury-of-six sessions with others filling in as needed. The remaining probation officers work in the primary court or on supervision of offenders. Probation orders entered in the BMC jury-of-six session are returned for supervision to the primary court from which the case originated, whether the BMC primary court or one of the District Courts in Suffolk County. There are no probation officers assigned to supervise offenders at the BMC jury-of-six session. The jury-of-six courtroom probation officer has the duty to present to the judge such information as the probation department of the BMC and the Commissioner of Probation has regarding the defendant before the Court.

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51 For example, see Section II. 16 on the subject dealing with clerks' failure to record tape numbers and footage.

52 Layoffs during the course of this inquiry have reduced this number.

In January, 1988, a fire destroyed the offices and some of the records of the BMC Probation Department. None of the jury-of-six records were destroyed. The fire prompted a remodeling of the department's offices. In addition, the fire delayed the computerization of the department which was accomplished in conjunction with a statewide program undertaken by the Commissioner of Probation. Before computerization, a search for a defendant's record by the BMC probation department consisted of a search through its own alphabetically-arranged records together with a paper request to the Commissioner of Probation for information. An alternative method for obtaining records was to request the information by telephone. The Commissioner of Probation maintained alphabetically-arranged card files that were used to record information from throughout the Commonwealth and respond to requests for record information. This method of record search was responsible for occasional erroneous reports and resulted in some of the case problems which are discussed later in this report. Recently, the Commissioner of Probation computerized this information and the BMC went on-line with the computer at the end of 1988. Since this occurred, the statewide records of the Commissioner of Probation could be accessed directly by computer terminal from the BMC Probation Department offices. Also, the search procedure could also be carried out so as to find records with misspelled names. The computerized system has improved accuracy and has resulted in more timely information.

9. Operation of BMC Primary Court for Criminal Business

Generally, there are three daily sessions of the primary court. The First Session normally hears cases involving male offenders, except operating under the influence offenses. The Second Session, held in the adjacent courtroom hears cases involving female offenders and OUI offenses. Each of these sessions has a daily list consisting of arraignments, trials, and various related motions and other matters. In addition, felony probable cause hearings are called in these sessions. The Third Session hears trials, motions and probable cause hearings on an assigned basis from either the First or Second Session. The civil sessions, when free during the day, also take cases from the primary court for hearing or trial on an as-needed basis. Each session has an assistant clerk. In the First and Second Sessions, the assistant clerk is assisted by a courtroom procedures clerk. Four probation officers are regularly assigned to the First Session, three to the second session and one to the Third Session.

10. Operation of BMC Jury-of-Six Session

Cases arrive at the jury-of-six session from Suffolk County District Courts on a daily basis. When the documents from the district court arrive (the Complaint and other transfer forms), the BMC clerk's office assigns one or more docket numbers. The District Courts assign one docket number to each alleged criminal incident

and use alphabetical suffixes to identify separate charges arising from the incident. The BMC jury session assigns a separate docket number to each different offense charged. Related civil infractions (for example, traffic violations) are not given a separate docket number.

The date for first appearance in the BMC jury-of-six session is assigned by the District Court or BMC primary court. The case information, together with the first appearance, is entered into the BMC jury trial office computer. This computer is not, at present, used for calendaring or creating the list, but is used solely to generate statistics and reports for the BMC and OCAJ. Dates are calendared manually in the BMC Jury Trial Clerk's Office as is all case-specific record keeping. The first appearance date is typically within two to three weeks after the date of the jury claim in the district or primary court. As a result, it is not unusual for the first appearance date to arrive and the defendant to appear in the BMC for first appearance before the papers arrive from the district court.

All cases in the BMC jury trial session start at the Assignment Session, presently located in Room 371. The Assignment Session is staffed by one judge, one assistant clerk, one permanently assigned assistant to the assistant clerk (presently Patricia Neff), one probation officer and court officers. Cases from the Assignment Session may be sent to another courtroom for trial or disposition. Usually, but not always, there are three other courtrooms for jury

session cases, two of which have the capability and are used to try jury cases.[53] The third courtroom, Room No. 395, is not sufficient for jury trials, but is used for jury-waived trials, conferences and motions.

At the first appearance, the case is called in the Assignment Session. Although the numbers vary, typically there will be a daily list of about 25 cases for first appearance in the Assignment Session. Generally, the following actions occur: default if defendant not present; assignment of counsel if necessary; or assignment of a trial date. Less frequently, other actions are taken: scheduling of discovery; motion filing deadlines; withdrawal of appeal; or change of plea. Cases are not expected to be ready for trial with witnesses on the first appearance date. Infrequently, where the prosecution and defense request, the case may be conferenced and may be followed by an admission or plea. The procedures used for conferencing are more fully set out below.

Trial dates are typically assigned for one or more months following the first appearance date. During one short period, the BMC attempted to pre-try cases,[54] and this scheduling was

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53 Recently, an additional courtroom (Room 100) has been used by the BMC for jury trials. However, this session has generally been designated for specific types of cases (such as firearm cases) which require special attention.

54 The pre-trial was that referred to in Rule 11, Mass. R. Crim. P., and did not require the presence of the judge.

established at the first appearance. This system, shortly, fell into disuse and is not now used. It was felt that all were too busy to follow through with this system. In addition, cases are, on occasion, scheduled from the first appearance date (and from other appearance dates) for "status" - meaning that the prosecution and defense are to report to the Court regarding progress on outstanding matters (such as discovery) or for conference with no expectation that the case will be tried on the status date.

Following the first appearance date, the next time a case is before the Court it is usually for a trial date.[55] On a daily basis, the Assignment Session has from 30 to 90 cases on the trial list. This number varies according to the practice of the Assignment Session judge in assigning trial dates. Some judges run a "tighter" trial list - assigning fewer cases, but expecting more of them to be disposed of on the trial date, while others assign more cases than can be effectively handled on a daily basis with the expectation that many of the cases may not be ready for trial on the assigned date.

The call of the trial list commences at about 9:30 a.m. in Room 371. The Assignment Session judge assigns cases that are announced

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55 A review of BMC jury session Assignment Session lists for some sample days yielded the following:

DATE	TRIALS	FIRST APPEARANCES	HEARINGS
Jan. 23, 1990	55	23	6
March 12, 1990	75	5	23
March 20, 1987	33	19	12

to be ready for trial to one of the two jury trial sessions. Not all cases on the list are announced as ready for trial and sent to the jury trial session. A large portion of the trial list consists of cases in which some essential person is absent (attorney, defendant, police officer, victim or witness), some essential matter needs to be resolved before trial (motion to suppress, discovery) or the parties request a conference.[56]

No time schedules are adhered to for the filing and hearing of motions such as motions to suppress and for discovery. It is not unusual to have new motions appear or requests to have previously-filed motions heard on the trial date. In this circumstance, one party may appear ready for trial and the other ready only for hearing on a motion. Motions not requiring a lengthy hearing or the taking of evidence are frequently heard in the Assignment Session. Motions that are lengthy or require that evidence be taken are usually sent to another courtroom, commonly the room not equipped to handle jury trials. The BMC supplies preprinted forms for motions for continuances. However, during the course of this inquiry it became clear these written motions, to be filed in advance of the trial date, were not frequently used. Much more frequent was the continuance of the trial date given at the time of trial.

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56 For the three dates for which Assignment session business was sampled above, the number of cases continued from the trial list were:

January 23, 1990	26 out of 55
March 12, 1990	38 out of 75
March 20, 1989	12 out of 33

When a victim, witness or essential police officer witness is not present at the trial date, the Assignment Session judge has the discretion either to continue the case to a new date or dismiss the case for want of prosecution (DWOP). (In addition, the attorneys may request to conference the case.) The decision to continue or dismiss is usually based upon the number of times the case has previously been on the trial list and the reasons for continuances on those occasions, whether the case has previously been marked "No Further Continuances" (NFC) and the level of frustration of the Assignment Session Judge in finding cases ready for trial. Continuances are common for lack of an essential witness as well as for other reasons.

The attendance of police officers presents a special situation in the BMC jury trial session. In almost every case, the arresting police officer is an essential witness. No part of the trial scheduling process takes into account the police officer witness schedule or other scheduled court appearances for the police officer. Defense attorneys and assistant district attorneys rarely, if ever, communicate before the day of the trial regarding availability of witnesses or on other matters, such as conflicting engagements. No mechanism exists for coordinating trial dates with police availability, vacations, training or other commitments.

The process for notifying police of trial dates, as is

described in the section on District Attorneys[57], is not entirely reliable and often results in the failure of police officers to appear. The BMC does not keep statistics for numbers of dismissals for want of prosecution because of the lack of a police witness, but rather lumps these into the "Other Dispositions." However, it is clear from a review of cases during this inquiry that the majority of dismissals were for lack of police officers and other witnesses, primarily police officers. Although these dismissals usually were without prejudice allowing the cases to be refiled, as a practical matter the dismissal usually ended the prosecution of the matter involved. Cases so dismissed are rarely refiled. The process that frequently results in dismissal of a case for want of prosecution because of a lack of a police witness and then permits the case to disappear forever, presents a gaping hole in the criminal justice system and constitutes an invitation for abuse.

Because counsel do not communicate prior to the day scheduled for trial, it is usually not known whether a continuance will be sought until the case is called. This results in trial dates often not being taken seriously, frequent continuances and witnesses showing up needlessly. This also adds unnecessary expense to the system, since police are paid overtime for non-duty time appearances. The lack of certainty compounds the witness problem and translates into further uncertainty as to whether a judge will

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57 See Section II. 14.

dismiss a case for want of prosecution. Usually a case is not dismissed the first time it is scheduled for trial.

If the defendant is not present, the Assignment Session judge can either continue the case or default the defendant with or without issuance of a warrant. Most frequently, if no excuse for absence is tendered, the defendant will be defaulted. If the defendant's attorney is not present, usually it is because of a conflicting appearance elsewhere, and the case is continued.

Continuances are also given to cases on the trial list that are ready for trial when the trial sessions are full. The Assignment Session Judge keeps a running tally of cases assigned to each of the sessions and when a judgment is reached that no additional cases can usefully be sent to the session, cases after that point on the trial list are not sent out for trial, but must be continued, conferenced or both. With the number of cases on the daily trial list, it is not unusual for this point to be reached, and cases left are continued. Cases are not usually held from one day to the next in the Assignment Session so that each of these unreached cases is most often reassigned a new date. In addition, some cases sent to one of the trial sessions are not reached for trial by the end of the day. It is not the usual practice for the trial session to hold these cases until reached, although on rare occasions this does occur. Most often, cases not reached in the trial sessions at the end of the day are returned to the Assignment Session for a new trial date. Occasionally, new trial dates are given directly in the

trial session. However, in order to control the number of cases on the daily trial list, most new dates are given by the Assignment Session judge.

During the call of the trial list, one or both of the parties frequently request that a case be held to the next call of the list. Often no reason is given or required. The effect of this request is to drop the case down in the order of the list for assignment until all the other cases that have answered the First Call have been assigned. The daily trial list usually goes through a first, second, third and even fourth call before some action is taken on every case.

Requests to conference a case frequently are made for cases on the trial list. The Assignment Judge often has a third session aside from the two jury trial sessions which is reserved for conferencing cases. This session is held in Room 389, which is not large enough to hold a jury session. In addition, cases may be conferenced in either of the jury trial sessions or the Assignment Session Judge may hold cases in the Assignment Session for conferencing. The conference process is generally an attempt to resolve the case without trial in a manner agreeable to the prosecution and defense without trial. Different judges have different practices for conducting conferences, as will be more fully described below. Conferences have become an essential part of the BMC process for resolving cases and a significant portion of the daily trial list goes to conference for resolution.

The Assignment Session has a daily volume of "walk-in" unscheduled business. Most frequently, those cases represent defendants who have been defaulted, and either come in to have defaults removed and trial dates assigned, or have been arrested on another matter and are brought to the Jury Trial Session because of the outstanding default. Assignment Session Judges also, after the calls of the list are finished, dispose of cases by taking guilty pleas, admissions to sufficient facts and sometimes by hearing jury-waived trials.

Trials in the jury-of-six session of the BMC are rarely actual jury trials. Only 1.7% to 5.3% of the cases entered in the BMC jury-of-six session actually end in a jury trial. During the years covered by this inquiry the percentage of jury-of-six session dispositions actually tried to a jury in the BMC were substantially less than the statewide District Court average. The figures are as follows:[58]

Fiscal Year	BMC Percentage	District Court Department Percentage
1985	5.3%	12.9%
1986	4.2%	13.7%
1987	3.1%	12.7%
1988	1.7%	11.2%
1989	2.7%	8.2%

As demonstrated above, to the extent that cases are actually tried in the BMC jury-of-six session, the vast majority are tried

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58 These figures are taken from the Annual reports of the Massachusetts Trial Court, 1985 through 1989.

jury-waived.[59] Defendants, having claimed a jury trial either in the first instance or de novo from the District Court or BMC primary court, frequently waive the right to a jury trial and have the judge decide their cases. One reason for this, as stated by some during this investigation, is the perception that the judges in the BMC jury trial sessions generally give better results for the defendants than the District Court judges in Suffolk County. The perception is based upon the impression that District Court judges must respond much more carefully to the need to satisfy community expectations and that District Court judges can and do over-sentence with the knowledge that the defendant has an opportunity to appeal de novo. Because of time constraints, no in-depth analysis could be conducted to test these perceptions.

Cases that are tried in the BMC jury session to a judge rather than a jury are usually brief, frequently lasting less than thirty minutes. Occasionally such cases are tried wholly or in part on an agreed statement of facts. For example, by agreement, the prosecutor in an OUI case might read the police report including the field sobriety tests and then rest. The jury-waived trial of cases in the jury session is a common and essential part of the operation

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59 The actual number of jury-waived trials (where there are contested issues of fact) is impossible to determine because until the beginning of 1990, jury-waived trials were statistically lumped with admissions to sufficient facts in the BMC's internal record-keeping and reporting to the OCAJ.

of the BMC jury trial session, allowing the resolution of more cases.

A sense has been conveyed by many BMC judges of being overwhelmed by the volume of cases. This has created an emphasis by some on the number of case dispositions. The potential is thus created for attention more to numbers rather than to the individual case. This potential is heightened by lack of meaningful case flow management. In addition, as will be discussed later, the emphasis on the production of numbers has been used as an excuse for some improper practices in the jury trial session.[60]

The pressures created by the emphasis (by some) on statistics, the confusion and uncertainty resulting from "loose" trial dates, the informality and inconsistency that exist, and the general unpredictability as to when or why events occur present opportunities for abuse.

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60 See Section IV. 3.

11. Assignment of Judges, Clerks, and Cases to Sessions

In view of the allegations that the six named attorneys appeared often before certain judges, it became necessary to examine the procedure by which BMC judges are assigned to the jury-of-six session and to determine the frequency with which they sat in those sessions. In addition, the assignment of clerks and cases was examined.

a. Assignment of Judges

Assignment of BMC judges to the various sessions is the responsibility of the Chief Justice as part of his administrative duties. Mr. John Pepi, the Chief Court Officer, is responsible for maintaining the judicial assignment lists. Mr. Pepi makes up the list under Chief Justice Tierney's supervision and control. The records of BMC judges' assignments for the entire period covered by this inquiry (1985-1989) were obtained and reviewed.

Judicial assignments are made on a monthly basis with the following month's assignments made available to the judges about two weeks before the start of the month and publicly available at the first of the month. Generally, the practice has been to assign a judge to sit in a session for one month at a time. There are, and have been, two exceptions. First, in the primary court sessions, three judges are assigned to these sessions monthly, but on a weekly basis these three judges rotate among

the First, Second and Third Sessions. The second exception is in the Jury Trial Assignment Session where a judge is assigned for a period of three months. During the summer months and winter vacation periods, the assignments follow a less regular pattern.

Before Chief Justice Tierney became Chief Justice, the perception among some of the judges was that the various BMC judicial assignments were made selectively and not on a rotating basis. Certain judges were assigned more often to the criminal side of the Court, while others most often sat on the civil side. Additionally, certain judges were not assigned to the jury trial sessions or often enough to the First and Second Sessions of the primary court. The stated rationale for this practice was that the press of business required that judges with a particular talent for "moving" cases be assigned where their talents could be best utilized. There was dissatisfaction among several of the Associate Justices as a result of this practice, and several meetings where this discontent was discussed. Chief Justice Tierney, after his appointment as Chief Justice in May 1988, began as a stated practice the strict rotation of judges on a monthly basis throughout the BMC sessions, both civil and criminal. The practice of a three-month rotation in the Jury Trial Assignment Session and weekly rotation in primary court sessions were maintained. The three-month rotation was maintained for the Assignment Session because of the managerial skills required to administer the session and the fact that the Assignment Judge had to plan daily lists far in advance.

Under either system, it was and is possible for an attorney or party to make some general predictions in advance about which judges would likely be sitting in the jury sessions. For example, with the jury trial sessions, one could generally predict the group of judges likely to sit in these sessions.

Based upon the records of judicial assignments, the number of weeks that each judge of the BMC was assigned yearly for the period 1985-1989 to the various jury trial sessions, together

with the overall percentages, are tabulated as follows:

TABLE II. A

	1985	1986	1987	1988	1989	Total Weeks	Percentage[61]
Tierney, C.J.(260)[62]	27	17	20	16	18	98	37.7%
Bakas, J. (178)		4	15	26	14	59	22.7%
Donovan, J. (260)	17	22	21	15	11	86	33.1%
Dortch, J.(216)	11	15	19	16		61	23.5%
Feeney, J . (176)	46	15				61	23.5%
Hershfang, J. (212)	20	12	19	22	73		28.1%
Hurley, J. (260)	29	25	23	20	20	117	45%
Johnson, J. (260)	19	18	15	9	17	78	30%
Kelly, J. (213)		6	16	10	14	46	17.7%
O'Toole, J. (260)	15	20	12	14	25	86	33.1%
Pino, J. (260)	23	23	21	32	14	113	43.5%

Since Chief Justice Tierney, Judge Pino and Judge Hurley sat in the jury-of-six session more often than any other judge, the

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61 The percentage is the total number of weeks each judge was in the jury trial session out of the total number of weeks in the five-year period 1985-1989 (260).

62 The numbers immediately after each judge's name indicate the number of weeks that judge was on the Court during the entire five-year period. Judges who were on the BMC less than two years out of the five were omitted.

likelihood of any given lawyer appearing before them was higher.[63]

b. Assignment of Clerks to Sessions

Assignment of assistant clerks to the various criminal sessions is done mainly by Rosemary Carr, the First Assistant Clerk in the jury-of-six session, in consultation with Robert Block, the First Assistant Clerk for the primary session. The assistant clerks are assigned by week to particular sessions. The assignment process is done monthly during the last two weeks of the month, once the judges' assignments are received. There is no adherence to strict rotation. The assignment process is guided by which assistant clerks have the ability to handle a particular session (such as the Jury Trial Assignment Session or primary court First Session) and which clerks perform best with particular judges. All clerks work both in the primary and jury trial side of the BMC, except Linda Scanlon, who doubles as the administrator for the jury-of-six Clerk's Office. Records of assistant clerks' assignments are not retained for more than a few months, so that no analysis of the frequency of particular

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63 However, see Section III for a more detailed analysis of the frequency of certain lawyer/judge combinations.

clerks working in particular sessions or with particular judges was possible.

c. Assignment of Cases

The topic of assignment of cases must include a discussion of what is colloquially referred to as "judge shopping." "Judge shopping" may be loosely defined as an attempt by an attorney to influence where the case is sent for a proceeding.

This inquiry examined "judge shopping", so defined, in the BMC for two reasons. First, a prerequisite of preferential treatment of a certain lawyer's cases by a judge is that cases are heard by the judge. Second, the Globe report that the six named attorneys appeared more frequently before three BMC judges than others, carried with it the suggestion that "judge shopping" as occurring in the BMC constituted impropriety.

"Judge shopping" in the BMC jury-of-six session is not always dependent upon advance knowledge of where a particular judge will be sitting. Most often (but not always) "judge shopping," when it occurred, took place on the day the case was in court.

To the extent that "judge shopping" occurs, there appears to be a preference for Judge Pino and Judge Hurley. This preference is not confined to the six attorneys referred to in the Globe series but is more general.

The ready availability of continuances, the several trial calls, the practice of designating one session specifically for

conferencing of cases, and the number of cases called per day, permitted even an inexperienced attorney to maneuver a case to a particular judge in a particular session. One attorney stated that it was not necessary to be a "Rhodes scholar" in order to get a case before a particular judge in the BMC. One assistant clerk acknowledged that knowing which judge to appear before and getting the case to that judge is "what attorneys get paid for" by their clients. During a bench conference heard on a tape, Judge Pino was heard to tell an attorney how to handle another pending case against the defendant, but not then before the BMC: To ask for a first instance jury trial in order to bring the case to the BMC and then "keep shopping" for the correct judge."[64]

Attempts at "judge shopping" will occur in any court. However, it is the court's responsibility to impose appropriate limitations on this practice. It appears that the ability to "judge shop" is easier in the BMC because of the manner in which the court operates. The number of cases called for trial, the number continued together with the lack of certainty as to when events will occur, and the general turmoil and confusion facilitate the ability successfully to "judge shop."

12. Conferencing of Cases

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64 The quoted comments were found during a search of a BMC tape in the course of this inquiry. The case name and attorneys could not be positively identified.

Conferences in the BMC jury trial sessions are held by a judge in an attempt informally to explore the possibility of an agreed-upon recommendation and resolution of the case short of a full trial. The conferences are held in various places, including the ante-room of the judges' library, in an unused jury room, in the Court Officers' locker room or another ante-room adjacent to a courtroom.[65] Usually present are the judge, assistant district attorney, defense attorney, probation officer and assistant clerk. Conferences are not generally tape recorded,[66] but should be followed by a tape recorded proceeding in open court, whether or not the conference results in an agreed-upon recommendation.[67] Some judges are better at conferencing cases than others because of experience, disposition and other factors.

Different judges have varying practices with respect to both the extent to which they discuss the facts and expected evidence and how aggresive they are in an attempt to influence agreement. For example, one judge rarely entertains discussions on evidence, preferring to hear evidence only from the witness stand. Others

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65 With one exception, BMC courtrooms used in the jury session do not have attached lobbies.

66 Conferences which are not held in a courtroom are not required to be taped. See Section II. 16.

67 However, see Section IV. 2 on Judge Hurley and Section IV. 3 on Judge Pino with regard to their departure from required taping practices.

become more involved in the process, hearing more about the facts of the case and becoming more aggressively involved in seeking agreement. There is a sense among most BMC judges that at some point the hearing of evidence or expected evidence at conferences should result in the conferencing judge not sitting as the trial judge unless there is a plea or admission with an agreed-upon recommendation.

Conferencing of cases is an important, useful and appropriate vehicle to attempt to resolve cases. By inserting the judge into the process, it has the potential for fairly resolving cases of the type frequently encountered in the jury-of-six session with the goal of legitimately conserving judicial and non-judicial resources. It is an effective tool, similar to mediation, to manage the volume of cases coming into the BMC jury trial session and to wean out those that can be resolved from those that require trial.

However, the conferencing process has the potential for abuse. Having in mind that most cases in the BMC jury-of-six session are disposed of without jury, and in many of those after contested bench trials, care must be exercised to avoid exposure of the fact finder to detailed recitation of evidence in the context of an informal conference setting. Unless those limits are observed, the conference may enter a very dangerous phase.

Most BMC judges are aware of and observe these limitations.[68]

It should be noted that one BMC judge has testified that he and other judges have abandoned the practice of conferencing cases as a result of the Globe series. In view of the salutary purpose and effect of case conferencing, it would be unfortunate if the practice were totally abandoned in the BMC.

13. "Admission to Sufficient Facts" and "Continuance Without a Finding"

Two procedures for the disposition of cases which are frequently used in the BMC jury-of-six session are the admission to sufficient facts (Admission) and the continuance without a finding (CWOF). The use of these procedures in the BMC is common, and when properly employed, serve as useful and appropriate mechanisms for the disposition of criminal cases.

The case of Commonwealth v. Duquette, 386 Mass. 834 (1982), explains these procedures in jury trial sessions at the district court level. The Court stated that, "An 'admission to sufficient facts' or 'submission to a finding' means an admission to facts sufficient to warrant a finding of guilty." Id. at 838. In accepting an admission, the judge may either treat the admission as a plea of guilty or enter CWOF. Id. at 841. If the admission is treated as a plea of guilty and a guilty finding entered there

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68 However, see Section IV. 3 concerning the practices of Judge Pino.

must be "...an affirmative showing that the defendant acts voluntarily and understands the consequences of his plea." Id. at 841. In a CWOF, a "...judge continues a case for a lengthy period of time without making a finding of guilty. The judge may impose certain conditions on the defendant. At the end of the designated period, if the defendant has complied with the conditions of the continuance, the case is dismissed." Id. at 837-8. In Duquette, the Court explained the benefits to both the defendant and the Commonwealth of the use of CWOF:

> The benefit to a defendant is obvious: he may be able to avoid a trial and "earn" a dismissal of the indictment or complaint, thereby avoiding the consequences of having a criminal conviction on his record. These advantages would be especially appealing to a first offender or a defendant whose job security or family situation might be threatened by a conviction. The Commonwealth avoids the more time-consuming process of trial and sentencing....It has been suggested that such pre-trial diversion programs reduce the risk of recidivism for first time offenders, enable a defendant to preserve his community and family ties, and help reduce court backlogs. Id. at 843.[69]

Although admissions and CWOF are commonly encountered in combination, there is no requirement that they be used together.

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69 However, with regard to OUI cases, even a dismissal after a CWOF may be treated as a prior offense for purposes of a subsequent OUI conviction under conditions set out in G.L. c.90, §24. See Section II. 15.

For example, a judge may enter CWOF after a contested bench trial.

It should be noted that an admission requires the judge to engage in a colloquy with the defendant with regard to the waiver of certain rights.[70]

14. Suffolk County District Attorney's Office

An understanding of the operation of the BMC criminal jury-of-six session requires a review of the workings of the Suffolk County District Attorney's office. To a large extent, the District Attorney's office controls the readiness of cases for trial, the appearance of prosecution witnesses, the recommendation for disposition of cases and other essential steps in the BMC's handling of criminal jury cases. Therefore, the general operation of the District Attorney's office was explored during this administrative inquiry with particular attention to the functioning of the BMC jury-of-six department within the District Attorney's office.

District Attorney Newman Flanagan oversees a staff of about 100 assistant district attorneys. The organization of his

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70 The requirements relating to this colloquy are more fully discussed in footnote 141, infra. Duquette also requires that the facts serving as the basis for the admission be reduced to a written stipulation and filed with the case papers. Although admissions are commonly used in the BMC, no case reviewed during this investigation involving an admission was found to include the required written stipulation.

office, as it relates to the BMC, has Paul Leary as Mr. Flanagan's First Assistant. Gerald Malone, who is Chief Administrator for the District Courts, reports to Mr. Leary. Mr. Malone and Mr. Leary supervise Mary Orfanello, who is the head of the District Attorney's BMC jury-of-six session.

Ms. Orfanello, who has been a member of the bar since 1978, supervises about 5-8 assistant district attorneys who work in that session. Ms. Orfanello joined the Suffolk County District Attorney's office in February 1987 and was assigned immediately to the BMC jury-of-six session. After about nine months to one year, she became supervisor of the District Attorney's BMC jury session department, a position she still holds. Immediately before Mary Orfanello, the supervisor was Attorney Steven Foley who held the position for about one year. Before Mary Orfanello, the supervisor's position was usually assigned to one person for about one year. Mary Orfanello was kept in the position to give the office continuity. Ms. Orfanello carries a full case load, as well as overseeing the assistant district attorneys, the support staff in the office and any student-prosecutors assigned to the BMC jury-of-six session. The rotation of assistant district attorneys through the jury-of-six session is frequent with the average service in the office about six months to one year. Assistant district attorneys from the jury-of-six session are also used on an "as-needed" basis to fill in for absent assistants in the district courts of Suffolk County.

Cases are initially assigned to the various assistant district attorneys in the jury-of-six session by the office administrator; however, on occasion, the supervisor would assign cases. The assistant district attorneys assigned to the case frequently do not see the case through to disposition. Cases are "handed off" between assistant district attorneys at all the various points in a case's progress from first appearance to moments before a trial begins. The "handing off" of cases inevitably leads to assistant district attorneys appearing on cases with which they are unfamiliar. The resulting confusion infects the handling of cases at all stages. It often leads to oversight and reduces the ability to prepare and try the case properly.

The reasons for "handing off" of cases are several. Although some attempt is made by BMC judges to keep cases of an assistant district attorney together in one session, it frequently does not occur that way. A case may then be "handed off" to an assistant who just happens to be on the scene at the time.[71] In addition, the office frequently has only enough assistants to have one in each of the jury trial sessions and that may result in an assistant handling whatever cases are assigned to that session.

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71 See description of events in Commonwealth v. Maguire at Section VI 12.

The assistant district attorney who handles a case in the BMC jury trial session most often does not have real familiarity with the case until the day of trial. Therefore, the assistant usually does not know the witnesses, police or others until the case is called in the Assignment Session, and they identify themselves. Also, the usual practice is that the assistant and defense counsel do not speak before the trial date. It is unusual for defense counsel and the assistant to communicate by telephone. Neither defense counsel nor the assistant knows, in the usual course, whether the other will ask for or need a continuance prior to the morning of trial. No attempt is made when scheduling a case for trial to determine the availability of witnesses on the scheduled date. This, combined with the lack of communication before trial between the assistant district attorneys and defense counsel, results in multiple continuances with unnecessary appearances by witnesses.[72] This lack of communication, combined with the fact that the assistant district attorney usually does not know about the lack of availability of a witness until the day of trial, results in much uncertainty and unpredictability.

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72 In the past, attempts have been made by BMC judges to "manage" the system by ordering pre-trial conferences and the filing of conference reports (see Mass. R. Crim. P. 11), but this practice has fallen into disuse.

Notification of witnesses, including police officers, is the responsibility of the District Attorney's office with the assistance of the BMC clerk's office. When a case is assigned to an assistant district attorney, that assistant is supposed to review it and make a list on a pre-printed form, with the names and addresses of prosecution witnesses. The completed form is copied, one copy kept in the file, and the other used to notify witnesses when the case is assigned for trial. If all witnesses are MDC police, the form copy is given to the MDC police liaison officer in the BMC who notifies and schedules the officer. In that case, no subpoenas are issued unless requested either by the Court or by an assistant district attorney. In cases of non-MDC police witnesses, the completed witness form goes from the District Attorney's office to the BMC Clerk's office for issuance and service of subpoenas. The shared responsibility between the two offices, together with the several systems for notification of witnesses, inevitably leads to confusion and missed notifications.

As stated earlier, cases dismissed for lack of witnesses are frequently dismissed because of non-attendance of police officers.[73] Although there are a variety of reasons why police do not appear (vacation, sickness, appearances in other courts, detail work and other commitments, etc.), one prominent reason is

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73 See Section II. 10.

the failure of this notice process. There is also no attempt made to coordinate trial dates with schedules of police officers. Although it is uncommon for a case to be dismissed at the first time it is called for trial on account of lack of police attendance, it has on occasion occurred. When a case is dismissed for want of prosecution (DWOP) because of lack of police, the District Attorney's office sends notice of the dismissal informing the police officer's commander that the matter should be reevaluated to determine if a new complaint should be sought. However, as stated above, most cases that are dismissed for this reason end at this point and no new complaint is sought.

The "handing off" of cases results in reducing accountability for the individual case. This lack of individual accountability often makes it difficult to determine in any particular case what actually occurred or why. At its worst, as shown in the Maguire case discussed later in this report,[74] it makes difficult or impossible the identification of which assistant district attorney actually represented the Commonwealth at disposition when coupled with a failure in the taping system. Problems, encouraged by the lack of individual accountability and emphasis on moving cases, resulted, in instances found during this inquiry, of assistant district attorneys proceeding to trial

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74 See Section VI. 12.

with cases known to be undercharged (for example OUI charged when OUI second or third offense could be proven), going to trial without certified copies of required documents, or allowing the police to decide whether a dismissed case is to be refiled. Those problems are exacerbated by the lack of any attempt to schedule cases on dates when witnesses and victims are available, the failure to communicate prior to an appearance with defense counsel and the lack of meaningful pre-trial preparation.

It would be unfair to place all responsibility for this state of affairs on the District Attorney's office. Much of the problem results from the District Attorney's office being understaffed for the volume of business handled, together with pressures from BMC judges to move cases. Added to this is lack of a management system able to coordinate the role, function and staffing of the district attorney's office, judges, clerks and other support personnel. Although the Suffolk District Attorney could make some improvement to increase accountability of the assistants, he is otherwise attempting to do the best he can given the system within which he operates and the resources available.

15. "Operating Under the Influence" Cases

OUI cases are at the center of many of the issues discussed in this report. Those issues range from statistical analysis to

problems in individual cases. In fact, many of the overarching issues discussed in this report are related in some way to OUI cases.

Offenses charging operating under the influence of intoxicants (OUI) form a large percentage of the BMC jury-of-six business. Neither the BMC nor the Office of the Chief Administrative Justice (OCAJ) has published statistics showing the number of OUI cases as compared to other cases in the jury session. Therefore, this inquiry evaluated data to determine what percentage of BMC jury session cases were made up of OUI matters. A survey of 1988 and 1989 jury session docket entries revealed that OUI cases comprised 28% of entries in 1988 and 19% in 1989. In addition, a computerized list generated by the BMC in connection with this administrative inquiry revealed 1,193 OUI cases disposed of during calendar year 1988 in the jury-of-six session. The total number of cases disposed of in the jury session during calendar 1988 was 3,543. Thus, during 1988, 33.7% of the cases disposed of in the BMC jury session were OUI cases.[75]

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75 The differences between the percentages of cases entered and disposed of are not fully explainable. It may very well be, however, that they are caused by "bumps" in OUI arrests and/or case dispositions.

Chief Justice Tierney computed percentages of OUI cases that he heard in the jury trial sessions as compared to the total number of cases he heard as: 22.2% in 1985; 26.2% in 1986; 35.3% in 1987; 32.2% in 1988 and 28.4% in 1989.

In addition, the six lawyers named in the Globe series had a high percentage of OUI cases among their BMC jury-of-six cases:

1985 - 1989

	Total Cases	OUI cases	Percent OUI
Attorney DiMasi[76]	26	17	65%
Attorney Finnerty[77]	54	35	65%
Attorney Flaherty	111	69	62%
Attorney Kenneally	24	23	96%
Attorney LoPresti	22	12	55%
Attorney Saggese	31	17	55%

OUI cases come to the BMC jury-of-six session almost exclusively from the District Courts of Suffolk County. OUI cases made up not more than 2% of the business of the BMC primary court.[78] Most defendants in OUI cases are represented by privately-retained counsel in contrast to other types of cases in which defendants more frequently have court-appointed counsel. Most of the OUI arrests are made by MDC police.

Most of the OUI cases which this inquiry encountered fell into one of several very repetitive fact patterns. The cases can

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76 These may include cases handled by the named attorney, his employees or asociates.

77 See note 76.

78 The yearly percentages for the 1985-1989 period of this inquiry were:

	% OUI in Primary Ct.
1985	(Not Available)
1986	1.88%
1987	2.12%
1988	1.99%
1989	1.56%

Annual Reports of the Massachusetts Trial Court, 1985-1989.

be divided into two categories depending on whether or not there were aggravating circumstances which include a collision with or without personal injury or property damage. Most cases involve no aggravated circumstances, but a stop of a car by an officer on the basis of observed driving irregularities or equipment defects. Generally, there is evidence available from the arresting officer concerning the nature of the observed operation of the vehicle (if that was a factor in the vehicle being stopped) and observations of the defendant leading the officer to conduct a field sobriety test (such as slurred speech, glassy eyes, unsteady on feet, odor of alcohol). A field sobriety test is usually the basis on which the arrest is made. It may consist of asking the defendant to perform several tasks such as reciting the alphabet, walking heel-to-toe in a straight line, touching fingertip to nose after having arms outstretched with head tilted back and eyes closed, counting backward, standing on one leg and a so-called nystagmus test.[79] The decision to arrest is followed at the station by the offer of a breathalyzer test and/or blood test (the latter at the defendant's expense). Refusal of such a test results in automatic loss of license for a period of time.[80] During the past five years, the number of defendants refusing

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79 The nystagmus test is an observation relating to movements of the eyeball which can be caused by alcohol intoxication as well as other conditions.

80 G.L. c. 90, §24.

breath testing and accepting mandatory loss of license has increased. The absence of a breathalyzer makes the other factors central in the government's case and in most instances will make the government's case more difficult to prove. Issues involving observations and credibility become more important. Also, the perception among some in the BMC, is that the case of Irwin v. Town of Ware, 392 Mass. 745 (1984) (holding a town liable for failure of a police officer to arrest an impaired operator who subsequently caused an accident after being stopped and released), influences the police to err on the side of arrest where any question exists concerning the operator's intoxication.

Because of the above factors, OUI cases were chosen to study statistically the results of various lawyer/judge combinations in the BMC, as is more fully explained in the section on statistics.[81] They have much in common and thus minimize the effect of extraneous factors. They are present in large numbers, have similar facts patterns, tend to result in similar dispositions, and defendants are usually represented by private attorneys. They also comprise a majority of the cases handled by the six attorneys highlighted in the Globe series.

In first offense cases where there are no "aggravating circumstances" there is a usual and customary sentence in the BMC that is nearly uniform (although not unanimous), according to

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81 See Section III.

those of whom inquiry was made. In this sentence, the defendant is assigned to an alcohol treatment program, usually Alcohol Safety Action Program (hereafter "ASAP") and loses his or her driver's license for a period of time. That sentence follows either a finding of guilty or a continuance without a finding (CWOF), but more often a continuance without a finding. In the latter case, CWOF is usually for a period of six months to one year on the condition that the defendant attend the treatment program.[82] This is the so-called "24D disposition" referring to the statutory alternative disposition set forth in G.L. c. 90, §24D. If CWOF is used in the disposition, the matter can be dismissed at the end of the continuance period. Sometimes this is done sua sponte, sometimes on motion of the defendant, and sometimes the dismissal is never entered on the docket.

In non-OUI cases, the CWOF leaves the defendant with a "clean" record at the end of the continuance period where the matter has not been brought back before the Court by any subsequent offense. However, in OUI cases, the CWOF disposition in combination with the 24D alternative sentence, as described above, has essentially the same effect as a guilty finding with a 24D disposition on subsequent OUI offenses. The statutory scheme

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82 Often on BMC case files and dockets, the notation "CFFS" accompanies CWOF. This is an acronym for "court finds facts sufficient" and refers to a practice of finding facts sufficient to find the defendant guilty after a jury waiver, yet not entering a guilty finding but rather CWOF.

for dealing with OUI cases provides minimum mandatory sentences which increase for second, third and subsequent offenses. The statute also provides that the trigger for punishment as a second or a subsequent offense is either conviction within a six-year period or the imposition of a mandatory alcohol treatment program; therefore, the BMC disposition of CWOF with a 24D sentence, including the ASAP program is not substantially less in severity than a guilty finding with the same sentence insofar as subsequent offenses within the six-year period are concerned. The difference is that for the purpose of employment and military, the CWOF disposition may allow the defendant to have a "clean record."[83]

Second, third and subsequent offenses are subject to mandatory sentences that are increasingly harsher than the prior offense. However, the BMC jury session can only adjudicate those charges that are transferred from the District Court or the BMC primary session. If a case is charged in the District Court as a first offense and comes to the BMC jury session on de novo appeal or first instance jury trial claim, the BMC can only try the defendant for a first offense even if additional offenses are discovered to have occurred within the prior six years. Often cases come to the BMC jury session that are undercharged, for example, cases charged as OUI first offense which could have been

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83 See Commonwealth v. Duquette, 386 Mass. 834 (1982), discussed in Section II. 13 of this report.

charged as second, third or subsequent offenses. The district attorneys in these cases frequently chose to proceed to trial and disposition on the lesser offenses rather than to send the matter back to the District Court or BMC primary court for a new complaint alleging the more serious offense. This practice of the district attorney's office is encouraged by the practice of some BMC judges to take prior offenses (which could have been used as a basis for OUI second offense or greater charges) into account at the time of sentencing. However, whether a judge will do that in a given case is not always predictable. While clearly a judge can properly consider the prior offenses at sentencing, the practice of going to trial and disposition on these undercharged cases may sometimes provide a substitute for the statutorily mandated sentence. However, as will be discussed in conjunction with specific cases, the shortcut of trial and disposition of undercharged cases can also provide a means to frustrate the mandatory sentences for OUI second and subsequent offenses.

16. Tape Recording of Proceedings

In view of some of the findings set forth later in this report concerning the absence of tape recordings of some proceedings in the Boston Municipal Court, a brief summary of the rules applicable to taping and its history follows.

a. History of Rules for Tape Recording of Proceedings

Electronic recording devices were first introduced into the District Courts and the BMC during the mid-1970s in order to provide a record and to ensure the "integrity and legal propriety" of proceedings.[84] The use of audio equipment[85] as a method to preserve testimony in the District Courts was recommended by former Chief Justice Flaschner "because of its accuracy, ease of operation, and relative inexpensiveness."[86]

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84 Flaschner, "The District Courts of Massachusetts: The Office of Chief Justice and Five Precepts of Judicial Administration," 58 Mass. L.Q. 115, 123 (1973).

85 See Sherman, "The District Court Department of the Massachusetts Trial Court--Then, Now and Prospects for the Future," 24 New Eng. L. Rev. 727, 729 (1990). Because there were no "official" stenographers in the Boston Municipal Court or District Courts, tape recording devices provided the only method to memorialize proceedings unless the court or counsel, with the court's permission, chose to record a particular proceeding stenographically or by tape. See Comments to Rule 80, District/Municipal Courts Rules of Civil Procedure (effective July 1, 1975).

86 Commonwealth v. Gordon, 389 Mass. 351, 354 (1983), quoting from Report on the Preservation of Testimony in Proceedings in the District Courts at 31, 87-115 (November 30, 1973). This Court further quoted from this 1973 report as follows:

> In his report, Chief Justice Flaschner wrote of the advantages of audio recording over stenography. "While an audio recording may preserve many of the pauses, hesitancies, irrelevancies and poor grammar of some persons, these are things of which trials are made. It is the words uttered that comprise the record, not another's version of them. Audio recordings will also preserve inflections and aural demeanor which typewritten transcripts will not. They are not instantaneously editable as are a

Since their introduction, the rules of court applicable to recording courtroom proceedings have been modified a number of times.

In connection with the introduction of tape recorders in the BMC, various rules of court were adopted to govern the use of the recorders in the courtroom, the procedure to obtain cassette copies of courtroom proceedings, and the preservation of tapes. For BMC criminal proceedings, Rule 15 of the Rules of the Municipal Court of the City of Boston Sitting for Criminal Business was adopted in the mid-1970s. That rule (Criminal Rule 15(A))[87] required recording of all courtroom proceedings in criminal cases as follows:

> All courtroom proceedings in criminal cases conducted by a judge, except (1)

(footnote, continued)
> reporter's notes, and are a more accurate record of courtroom events. On playback they carry with them the flavor as well as the letter of what occurred and are superior to the 'cold record' which otherwise results. To the extent that this ultimate accuracy produces a record that is perfectly reflective of what happened in court, it should be favored." Id. at 49-50.

389 Mass. at 354-355.

87 Rule 15(A) of the Rules of the Municipal Court of the City of Boston Sitting for Criminal Business concerned sound recording devices under the court's control (i.e., those installed in courtrooms), while Rule 15(B) concerned sound recording devices under the control of a party (i.e., those brought into a courtroom by an attorney).

> complaint hearings, (2) the call of the list, and (3) similar matters of preliminary or administrative nature, shall be recorded electronically, subject to the availability and functioning of appropriate recording devices. Sections (A) (2) through (A)(7) of Rule 114 of the District/Municipal Courts Supplemental Rules of Civil Procedure shall be applicable to the recording of criminal proceedings under this rule.[88]

Supplemental Rule 114 provided that the original tape which recorded the courtroom proceedings be retained and that a party who desired a copy could request a cassette copy thereof.

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88 Similar requirements were adopted for District Court criminal proceedings by Rule 11 of the Initial Rules of Criminal Procedure for the District Courts of Massachusetts and later by Rule 9 of the District Court Department Supplemental Rules of Criminal Procedure (effective February 1, 1981).

Rule 114 of the District/Municipal Courts Supplemental Rules of Civil Procedure, which became effective in 1975 and was applicable to both the District Courts and the BMC, was a comprehensive rule governing recording of civil proceedings. As originally adopted, the provisions of Rule 114 were not identical for District Court civil proceedings and BMC civil proceedings. In the District Courts, the rule required recordation of civil proceedings, while in the BMC, the rule required recordation of civil proceedings only upon written request of a party. Rule 114 (A)(1)(a) and (A)(1)(b) of the District/Municipal Courts Supplemental Rules of Civil Procedure.

After a decade of experience with the use of courtroom recording devices, and apparently in response to problems contributing to poor quality of tape recordings and inaudible recordings, Rule 114 was amended in 1986 specifically to require counsel to use the courtroom microphones properly so that an audible record would be made.[89]

b. Current BMC Rules for Taping

Effective on February 1, 1988, the rules of court concerning taping were amended to consolidate both the civil and criminal

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89 A new subsection was added to Rule 114 (A) as follows:

> (8) Counsel. Counsel shall be responsible for assisting in the creation of an audible record by properly using the microphones provided. Counsel shall speak with sufficient clarity and in sufficient proximity to the microphones to ensure an audible record, and shall be responsible for requesting the court, when necessary, to instruct other counsel, witnesses or others as to the proper use of the microphones in order to ensure an audible record.

The problems of quality persist, however. Recently, the Supreme Judicial Court, in an appeal from a denial of relief presented to a single justice pursuant to G.L. c. 211, §3 concerning the propriety of certain orders entered in a civil action in the BMC, commented:

> On the request to set aside the ruling on the motion for disqualification, the single justice attempted to obtain tapes of the Boston Municipal Court proceedings. The tapes, when obtained, were unintelligible. The single justice determined that the tapes were unintelligible without fault of any person. Allen v. Christian, 408 Mass. 1007 (1990)(rescript).

rules into one rule for the District Courts and one rule for the BMC. In the BMC, taping is now governed by Rule 308 of the Special Rules of the Boston Municipal Court Sitting for Civil Business.[90]

For criminal cases, Rule 308 requires taping of all courtroom proceedings except (a) the call of the list and similar matters of an administrative nature; (b) proceedings that are recorded by a court appointed court reporter; and (c) proceedings that are conducted by a clerk-magistrate.[91]

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90 Rule 114 of the District/Municipal Courts Supplemental Rules of Civil Procedure, which had governed tape recording of civil proceedings, was amended in 1988 to provide that recording of court proceedings in the Boston Municipal Court is governed by Rule 308 of the Special Rules of the Boston Municipal Court. Although Rule 308 is part of a set of rules now entitled Special Rules of the Boston Municipal Court Department Sitting for Civil Business, Rule 308 is applicable to tape recordings in both civil and criminal cases in the BMC by virtue of a 1988 amendment to Rule 15 of the Special Rules of the Boston Municipal Court Department Sitting for Criminal Business, which had governed tape recording of criminal proceedings. Recording in the District Courts is now governed by Rule 211 of the Special Rules of the District Court.

91 Rule 308 provides in part:

> A. Official recordings.
> 1. When required. In all divisions of the District Court Department and in the Boston Municipal Court Department, all courtroom proceedings, including arraignments in criminal and juvenile delinquency cases, shall be recorded electronically, subject to the availability and functioning of appropriate recording devices, except that the following may but need not be recorded: (a) the call of the list and similar matters of an administrative nature; (b) proceedings that are being recorded by a court reporter appointed by the court; and (c) proceedings conducted by a magistrate

Thus, at all relevant times covering the period of this investigation, all courtroom proceedings conducted by a BMC judge in criminal cases were required to be recorded (except for such matters as complaint hearings or the call of the list), by virtue of either Rule 15 of the Rules of the Municipal Court of the City of Boston Sitting for Criminal Business (prior to February 1, 1988) or Rule 308 of the Special Rules of the Boston Municipal Court Sitting for Civil Business (on and after February 1, 1988). The requirement of taping all courtroom proceedings would encompass all aspects of a criminal trial, apparently including bench conferences.[92]

Original tape recordings of trials, evidentiary hearings, guilty pleas, or admissions to sufficient facts in criminal cases

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(footnote, continued)
other than a judge.

92 See Commonwealth v. Rosenfield, 20 Mass. App. Ct. 125, 126 (1985). In Rosenfield, the Appeals Court had before it a transcript of a District Court hearing, apparently made from the courtroom tape recorder and was reviewing a dismissal by a District Court judge of a criminal nonsupport complaint after a bench conference. The portion of the hearing at the bench was described in the transcript as a "long, inaudible conversation," and the Appeals Court noted: "We fail to see what purpose an unrecorded bench conference could have served in a criminal case without a jury. District Court Supp.R.Crim.P. 9 (1981)." 20 Mass. App. Ct. at 126, n. 1.

must be preserved for two and one-half years.[93] After that time, they may be erased.

It should also be noted that as originally promulgated, the tape recording rules allowed access to tape recordings to be given to a party or counsel for a party. Any other person desiring a cassette copy was required to make a written submission to the judge who presided over the proceeding setting forth "the basis of the request and the specific use to be made of the cassette copy." A cassette copy could then be made available to a non-party in the judge's discretion.[94] Subsequently, the tape recording rules were amended to allow cassette copies of any proceeding open to the public to be obtained by any person, whether or not a party to the case, unless the record was sealed or impounded.[95]

c. Purposes of Tape Recordings

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93 Rule 308 A.4., BMC Special Rules (Civil).

94 Rule 114(A)(3), Dist./Mun. Cts. Supp. R. Civ. P., prior to amendment in 1988. This limitation was of doubtful constitutional validity. See Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir.1989).

95 Rule 308 A.5.(a), BMC Special Rules (Civil). Special procedures exist with regard to requests by parties and non-parties of cassette copies of proceedings which were not open to the public or where the record has been sealed or impounded. Rule 308 A.5.(b), BMC Special Rules (Civil).

No attempt is made here to list all of the purposes which a tape recording of a criminal proceeding may serve. However, a brief summary of some of the purposes and uses for tape recordings follows.

i. Public's Right of Access. The right of the public to attend court proceedings and have access to court records[96] includes the right to obtain copies of tape recordings made in proceedings in open court.[97] Openness of proceedings enhances confidence in the judicial system and promotes the rule of law.

ii. Official Court Record. The recording of a proceeding produced by a recording device under the exclusive control of the court is, by statute, the official record of the proceeding.[98]

iii. Appellate Review. A party who claims an appeal to the Appeals Court from a BMC jury-of-six session may use a transcript of the BMC proceeding, produced from the tape recording, to

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96 This right of access has been recognized in numerous cases. See Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); New Bedford Standard Times Publ. Co. v. Clerk of the Third Dist. Court of Bristol, 377 Mass. 404 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539 (1977); Globe Newspaper Co. v. Pokaski, 868 F. 2d 497 (1st Cir. 1989)(First Amendment right of access to certain criminal records).

97 Boston Municipal Court Special Rule 308 A.5.(a) and District Court Special Rule 211 A.5.(a) are identical: "Any person, whether or not a party, shall be permitted to obtain a cassette copy of an original recording, or any portion thereof, of any proceeding which was open to the public, unless the record of such proceeding has been sealed or impounded."

98 G.L. c. 218, §27A(h)

prosecute the appeal, pursuant to Rule 8(b)(3) of the Massachusetts Rules of Appellate Procedure.[99]

iv. Evidence at Subsequent Proceeding. An audio recording made in a District Court trial may be admitted into evidence in a subsequent proceeding, either for the truth of the matters contained therein or for impeachment purposes.[100]

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99 Where a transcript is unavailable, the rules of appellate procedure do permit the appellant to "file a statement of the evidence or proceedings from the best available means, including his recollection," after which the statement is to be settled and approved by the trial judge. Rule 8(c), Mass.R.A.P. Alternatively, the parties may file a stipulation as to the lower court record, which also must be approved by the trial court. Rule 8(d), Mass.R.A.P. See Commonwealth v. Rosenfield, 20 Mass. App. Ct. 125 (1985).

The Supreme Judicial Court has held that in connection with an appeal by a defendant, "the fact that the [trial] transcript is unavailable through no fault of the parties does not warrant a new trial unless the trial proceedings cannot be reconstructed sufficiently to present the defendant's claims." Commonwealth v. Harris, 376 Mass. 74, 78 (1978). However, where the trial judge determines that the proceedings cannot be reconstructed sufficiently, a motion for new trial should be allowed; where the trial judge determines that the "reconstructed record is adequate to present any errors alleged by the defendant," the defendant's appeal may go forward. 376 Mass. at 79. See Commonwealth v. McWhinney, 20 Mass. App. Ct. 444 (1985); Commonwealth v. Watts, 22 Mass. App. Ct. 952 (1986).

100 Commonwealth v. Gordon, 389 Mass. 351 (1983) (testimony at District Court bench trial admissible to impeach witness at subsequent six-person jury trial).

See also, G.L. c. 218, §27A(h)

d. Taping Procedures and Equipment in the BMC

Each courtroom in the BMC is equipped with a tape-recording device. These devices are of two types: reel-to-reel and cassette. Cassette recorders are in Courtrooms 377, 394, 395, 396 and 100. The remaining courtrooms have reel-to-reel machines. Tape in each type of machine runs at a special slow speed to allow about three hours of continuous recording without changing tapes. The reel-to-reel machines are about 15 to 20 years old, and the cassette machines are about ten years old. The unique recording speed means that replacement machines are unavailable and spare machines difficult to locate. The age of the machines makes failure and repairs frequent and recording quality is sometimes poor. Despite these difficulties, no judge reported tape machine failure as a reason for failure to tape proceedings.

When a tape machine fails or malfunctions, proceedings cease and, if need be, move to another courtroom. As of the time of this administrative inquiry, the BMC did not have a back-up reel-to-reel recorder, and recorder malfunctions put the particular courtroom out-of-use until an outside contractor repaired the machine.

In each courtroom, the tape recorder is located on the clerk's desk immediately in front of the bench. There are generally microphones wired to the tape recorders for the judge, clerk, witness and counsel. The assistant clerk assigned to the

session is responsible for turning the machine on and off so as to tape all court proceedings. The on/off controls for both types of recorders are located on the machine itself. In all courtrooms, except one, there is a device, either push button or foot pedal, on the bench available to the judge to stop the tape recorder. This device is operated only from the bench and stops the tape from recording as long as it is depressed. When the foot pedal or push button is released, the tape recorder resumes recording if the on/off control on the machine located on the clerk's desk is in the "on" position. In all courtrooms with reel-to-reel recorders, there is a light on the bench, visible to the judge, which is lit when the recorder is operating. There is no visible or audible signal device designed to alert attorneys and members of the public as to whether or not the recorder is operating.

The BMC has had two tape librarians, Sheila Day and Arthur Cerniglia, during the period covered by this inquiry. They perform their duties well under extremely adverse circumstances. Their duties include replacing the reel-to-reel or cassette tapes in the courtroom on a daily or as-needed basis. Blank cassettes or reel-to-reel tapes are placed in the recorders to be used by the courtroom's assistant clerk. The full tape is removed by the tape librarians and stored in the BMC tape library located in the 2M level of the Old Courthouse. The tape library consists of a small office with an additional locked closet for storage. Tapes

are stored in both these locations. The office is locked during non-business hours. Storage facilities for tapes are crowded and inadequate. Although secure at present, the facilities present a risk of destruction or damage to the tape library. Blank tapes are numbered before they are put into the courtroom, and the librarians keep a log listing tape number, courtroom number, date tape put in the courtroom, date tape removed and the judge's name.

Tapes are retained until the supply of blank tapes is nearly exhausted, and then the oldest tapes are erased first to provide a new supply of blank tapes for use in the courtrooms. BMC rules[101] provide that tapes are to be retained 2 1/2 years. As of October 3, 1990, the BMC tape library contained all cassette and reel-to-reel recordings from January 20, 1986 to present. By memorandum of October 12, 1990 and at the request of the Special Master, Chief Justice Tierney ordered that all tapes be preserved. The librarians have been supplied sufficient additional tapes to accomplish this to present.

BMC rules[102] provide that the Clerk-Magistrate has ultimate custody of the tape recordings and responsibility for them. In the BMC, however, this responsibility has been transferred to the

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101 Rule 308(A)(4) of the Special Rules of the Boston Municipal Court Department Sitting for Civil Business.

102 Id.

tape librarians who are not organizationally part of the Clerk's office, but rather part of the Chief Justice's staff.

BMC rules[103] require that the courtroom assistant clerk note on the court papers for each case the tape number and beginning and ending tape footages recording the proceedings for the case. Both types of tape recording devices in use in the BMC have readily visible footage counters allowing the location in the tape by footage numbers to be recorded on the case papers. The purpose of this rule is to allow easy location of recordings of particular proceedings for copying on request. Consistently, over the period covered by this administrative inquiry, in a large percentage of cases, the courtroom clerks failed to note tape numbers and footage on the court papers. The tape librarians estimated that 50% of the cases lacked tape and footage numbers for the cases for which duplicate tapes had been requested by the public. Examination of case files made during this inquiry indicated that for the sample of tapes selected to be located, the percentage with tape and footage numbers not recorded were, in fact, much larger. The lack of consistent practice in recording these numbers is a condition allowing, but

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103 Rule 308(A)(2) states: "Logging. During every proceeding which is required to be recorded, the clerk shall: (a) announce clearly the name of the case and its docket number at the beginning of the proceeding; and (b) note on the case papers or in a separate log the number of the tape reel and the index numbers representing the beginning and end points of the proceeding."

not either a cause of, or an excuse for, failing to record proceedings. Failing to record tape and footage numbers results in difficulty locating recordings of proceedings and potential false negative reports of missing recordings.[104]

The BMC tape librarians also respond to and fill orders from judges, court personnel, attorneys and the public for copies of tape recordings of proceedings. Requests are made on a request form, the original tape and footage are located, and the original tape is sent out for duplication. Cassettes are duplicated by the Office of the Chief Administrative Justice and reel-to-reel tapes are duplicated onto cassette by Supreme Judicial Court personnel. Cassettes duplicated in either manner are playable on standard cassette players, but lose a substantial amount of the quality of the original recording. The BMC has no facility to allow the public or attorneys to hear original recordings. When a request is made for a copy of a recording where there are no identifying tape numbers or footage numbers on the case papers, the tape librarians turn to the tape log and locate the tape or tapes that were in the courtroom in which the matter was heard. Then the tape or tapes are listened to in an attempt to locate the footage recording the proceedings requested. The lack of the recording of tape and footage numbers on the court papers make

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104 Lack of tape numbers and footages greatly burdened the task of this administrative inquiry in locating recordings of proceedings. See Section I. 3 on methodology.

this a time-consuming and an unnecessarily frequent part of the tape librarians' duties. In addition, the lack of a spare reel-to-reel machine means that this job could only be performed during hours when a courtroom having a reel-to-reel machine was not in use.

Despite these difficulties, in responding to tape duplication requests, the BMC was able to successfully fill 358 requests in 1988 and 754 requests between January 1, 1989 and November 20, 1990. During the period January 1, 1989 to November 20, 1990, there were 23 requests that the BMC tape librarians were unable to fill because the tape indicated by the court papers or log was blank.[105] The reasons for blank tapes are: the machine was not put on; the record and run buttons on the machine were not pressed on together; the machine was shut off for some reason; or the tape was twisted. During the same period, there were 11 requests for tape recordings that the BMC was unable to locate because the librarians were unable to locate the requested proceedings on the tape indicated by the court papers or log. For an additional nine requests, the BMC was unable to duplicate the requested proceedings for unknown reasons

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105 These 23 unfilled requests do not include requests for duplicates made during the course of this inquiry, nor do they include requests made by the Boston Globe
There were no records available to determine the number and nature of tape duplication requests received in 1988 which the BMC tape librarians were unable to fill.

and in only one instance, was the original tape itself not able to be located. Overall, of 798 requests for duplicate recordings between January 1, 1989 to November 20, 1990, the BMC tape librarians were able to fill 754 requests for a percentage of 94.5%.

The subject of courtroom assistant clerks noting tape and footage numbers on case papers was not officially addressed in the BMC by Chief Justice Tierney until July 11, 1990 in a memorandum to Mr. Sheils and Ms. Carr which stated, "Would you kindly advise the Clerks in your office to make sure that on all criminal proceedings, the tape number and footage is listed." This memorandum followed requests by the Globe for duplicate recordings which the tape librarians were having difficulty in filling, and the explanation to Chief Justice Tierney for the difficulty in locating recordings without tape and footage numbers. Before this, the only written memorandum on this subject was in August of 1982 when tape librarian Arthur Cerniglia wrote to the Executive Secretary of the BMC and copies to then Chief Justice, Clerk-Magistrate and First Assistant Clerk explaining the difficulty in locating recordings without tape and footage numbers and that in over 50% of tape duplication requests, no numbers were noted on the case papers. Until the summer of 1990, there were no other formal requests to the Clerk's Office to note the numbers, although on several occasions, Sheila Day made this request informally of one

assistant clerk. The problem was not formally followed up during the period 1985 to 1990, and the problem of clerks not noting the numbers worsened.

Sheila Day testified that, in early 1990, she reported to Chief Justice Tierney difficulty in locating a proceeding on tape in response to a particular request for a copy. She testified that she explained the difficulty in locating the recording without tape and footage numbers. Chief Justice Tierney testified that he could not recall this specific incident, and that the general problem of tape and footage numbers not being recorded on the case papers was not brought to his attention until just before the July 11, 1990 memorandum. This difference in recollection may be explained by the informal nature and brevity of the contact.[106]

During the period covered by this administrative inquiry (1985 to present), it was determined that with respect to all but two BMC judges sitting during the course of this inquiry, there was compliance with the rules for the tape recording of proceedings.[107]

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106 See Section II. 7 regarding the administrative structure of the BMC.

107 See Section IV. 3 on Judge Pino and Section IV. 2 on Judge Hurley.

III.

STATISTICAL STUDY

1. Introduction

The Globe series of articles contained what purported to be a statistical survey of the BMC that in general terms was used to support the proposition that the six lawyers covered in the series had a high percentage of cases in front of the three named judges and that the results of these lawyers obtained were better than those of other lawyers. This investigation first focused on the Globe study and, finding it insufficient for several reasons, then conducted its own survey of the BMC jury trial session and the disposition of certain cases.

There is a caveat which must be considered when using statistics or numerical analysis in connection with the disposition of cases by individual judges, or results obtained by individual attorneys. Any such analysis, whether by the Globe or this investigation, cannot, by itself, prove or disprove improper conduct. It is believed that only investigation of conduct in a specific case can provide such proof. Further, the numbers of "good" versus "bad" dispositions or statistical trends in case dispositions may be explained by factors other than preferential treatment or improper conduct, for example, the skill of an attorney. Any numerical comparison of results obtained by

different attorneys and different judges ignores the fact that each case is different and unique. Statistics also do not not divulge the fact that a so-called "bad" disposition in one case may be a "good" result in another.[108] The list of variables could continue.

An additional concern in the case of the Globe' s data was that it tended to add to the variables by comparing cases as disparate as OUI and drug possession and indecent assault and theft of a motor vehicle. This investigation, in an attempt to minimize variables, used a smaller universe consisting of OUI cases only; however, even among OUI cases significant differences exist that make numerical comparisons of results often difficult to interpret.

2. The Globe Statistics

The Globe reported that the six named attorneys as a group had 69% of their BMC jury session cases in front of three judges. To collect this information, the Globe apparently went through five years (1985-1989) of BMC docket books to locate some 269 cases of the six lawyers. The Globe did not purport to analyze what percent of the time the three judges spent in the jury trial

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108 See Commonwealth v. Maguire, infra at Section VI. 12, where the defendant was charged with OUI third and found guilty of OUI first, thus making a statistically "bad" finding a "good" result for this particular defendant.

session, what percent of cases these three judges disposed of in the jury trial session, or other factors that might cause the apparent disproportion.

The Globe statistics also purportedly compared the results that the six lawyers obtained with those obtained by lawyers in general. The "results" for lawyers were obtained by conducting a "random sample of 698 adjudicated cases in 1988." (Globe, September 25, 1990) The Globe computed and compared acquittal versus guilty dispositions. An "acquittal" disposition was one that left the defendant's record "unblemished." Therefore, these included not guilty findings, dismissals of all types and cases continued without a finding (CWOF). As set forth above, the CWOF disposition, although it may ultimately leave the defendant with a clean record, has a special operation in OUI cases, and the six lawyers handle a high percentage of OUI cases in the BMC.[109] Using that method, the Globe found that the six

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109 The number of BMC jury session cases overall for five-year period, together with the number of OUI cases and percentage for each of the six attorneys are:

	Total Cases	Total OUI cases	Percentages
Attorney DiMasi	26	17	65%
Attorney Finnerty	54	35	65%
Attorney Flaherty	111	69	62%
Attorney Kenneally	24	23	96%
Attorney LoPresti	22	12	55%
Attorney Saggese	31	17	55%

In cases where Attorney Finnerty and Attorney DiMasi have entered appearances, these cases are included even though the final disposition was handled by an employee or associate. Those cases are also included in the other tables and analysis contained in the remainder of this Section where the period 1985-1989 is

lawyers combined had an "acquittal" rate in the BMC ranging from 88% (Attorney Flaherty) to 64% (Attorney LoPresti) while the three judges with the six individual lawyers had "acquittal" rates of from 76% (Judge Pino) to 89% (Judge Hurley). The proportion of acquittal rates for all lawyers and all judges was given by the Globe to be 40%, while the six lawyers had "acquittal" rates of 81% with the three judges.

While at first glance these figures seem disproportionate, analysis showed that the technique was flawed by several factors, one of which was the inclusion of CWOF in OUI cases within the "Not Guilty" and "Acquittal Rate" categories. The Commissioner of Probation prepared a compilation for 1988 of jury-of-six OUI statistics by type of disposition for each county and the BMC. In part,[110] these are:

(footnote, continued)
considered.

110 The compilation can be found at Appendix D.

TABLE III.A

DISPOSITION	GUILTY	CWOF	TOTAL CONVICTED	NOT GUILTY	DISMISSALS[111] NOLLE PROSSE	DISMISSALS[111] (For all reasons including DWOP)
Statewide '88 (N=5,896)	35.5	44.0	79.5	12.3	1.4	6.9
BMC (N=863)	11.0	58.2	69.2	18.2	--	12.6
Cambridge (N=389)	16.7	69.9	86.6	7.9	0.5	4.9
Dedham (N=667)	81.6	1.9	83.5	8.1	--	8.4
Lowell (N=290)	43.1	36.9	80.0	13.1	1.0	5.9
Springfield (N=374)	17.9	72.7	90.6	6.2	1.9	1.3
Worcester (N=593)	44.9	34.9	79.8	17.0	--	3.2

Unlike the Globe, the Commissioner of Probation includes OUI cases which were continued without a finding to be under the "Total Convicted" heading. The chart clearly shows the different practices among the counties of "guilty" vs. "CWOF" dispositions in OUI cases. Lumping "CWOF" dispositions with "Not Guilty," "Nolle Prosse" and "Dismissals," as the Globe did, the "Acquittal" rates

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111 Cases involving errors in reporting were omitted from the sample. Therefore, the total number of cases does not agree with the number of OUI cases for the BMC cited in Section II. 5.

for all lawyers and all judges for 1988 in the BMC OUI cases was 89%.[112]

Comparing the "acquittal" rates thus computed with the "acquittal" rates of the six lawyers and three judges in all cases, as set forth above, seems to indicate that the six lawyers were not treated in a substantially different manner by the three judges from the general population of lawyers and judges, if one considers only the OUI cases. Since the six lawyers had a higher percentage of OUI cases in the BMC compared to the total general population of all lawyers, the results of the Globe random survey failed to collect the correct sample. The Globe figures also do not include any statistical analysis of any particular lawyer/judge combination. Finally, the Globe did not compare what the three judges did individually in cases involving the general population, nor did it analyze what results some other individual lawyers obtained in the BMC.

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112 These "acquittal" rates clearly do not reflect a correct methodology, but are set forth merely to show application of the Globe's methodology to published OUI statistics. Using the Globe's methodology "acquittal" rates for other courts are:

Statewide	69.9%
Cambridge	83.2%
Dedham	18.4%
Lowell	73.1%
Springfield	82.1%
Worcester	55.1%

3. Methodology Used in this Report

For the reasons set forth above, this investigation undertook to analyze, statistically, the treatment of OUI cases by various BMC judges in the jury trial (except in Tables III. B and III. C) session when handled by the six named lawyers and by other attorneys. The purpose was not to prove or disprove the Globe's analysis, but to use the questions raised by the Globe figures and to conduct a more controlled analysis.

OUI cases were selected for several reasons:

1. They are the highest percentage among all types of cases handled by the six lawyers;

2. They share many common repetitive features which allows better comparison;

3. The BMC has a substantial number of OUI cases in its jury session so as to allow comparison;

4. The three judges named by the Globe have decided a substantial number of OUI cases so as to create an analyzable body of data;

5. Waiver of jury trial in the BMC in OUI cases is frequent so as to allow analysis of a judge's findings rather than jury verdicts.

The following methodology was used:

All OUI cases handled by the six lawyers for cases entered during 1985-1989 in the BMC jury session were identified, dockets checked and results tabulated. Then, all OUI cases, including both

first, second and subsequent offenses, in the BMC jury trial (except in Table III.B and III.C) sessions for all lawyers, entered in the years 1988-1989 were identified and tabulated in the same manner by a manual search of the docket books for those years.[113] Cases where a default was entered, appeal withdrawn or where there was an actual jury trial (except in Tables III. B and III. C.) were excluded from the analysis of both sample groups. Professor Pfeiffer was consulted regarding the collection of data and performed the statistical analysis of the data. The Tables included in this section are derived from Professor Pfeiffer's work, and the analysis and conclusions statistically drawn from the data, together with the explanations, are his. Cases were classified as either a "good" or "bad" (for the defendant) disposition in the following manner:

Good	Bad
Not guilty	Guilty
Dismissed (for any reason)	Admission
	CWOF
	CFFS

In addition, from the 1988 and 1989 survey "good" vs. "bad" ratios were computed for several lawyers who had significant number of OUI cases in the BMC but who were not mentioned in the Globe series.

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113 Approximately 13,000 pages of docket entries had to be searched.

The following table[114] shows the number of OUI cased disposed by each BMC judge for cases entered in the years 1988 and 1989:

TABLE III.B

JUDGE	1988	1989	TOTAL
Tierney, C.J.	80	68	148 5.1%
Pino, J.	381	282	663 22.9%
Hurley, J.	268	237	505 17.4%
Chin, J.	17	108	125 4.3%
Donovan, J.	89	142	231 8.0%
Johnson, J.	83	140	223 7.7%
Kelly, J.	37	71	108 3.7%
O'Toole, J.	60	141	201 6.9%
Bakas, J.	153	122	275 9.5%
Meagher, J.	16	67	83 2.9%
Dortch, J.	33	-	33 1.1%
Hershfang, J.	167	132	299 10.3%
COLUMN TOTAL	1,384	1,510	2,894 100%

Number of missing observations: 34

The significance of the above is that together for cases entered during the two year period, Judge Pino and Judge Hurley disposed of

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114 Several of the judges listed were either not sitting during this period or were otherwise on approved leave: Judges Chin, Kelly, Meagher and Dortch. Thus, these judges have low numbers of cases disposed of in either 1988 or 1989.

about 40% of all OUI cases, as compared to the remaining BMC judges. This disproportion confirms that these judges disposed of more cases, and in the normal course would also have disposed of a large number of cases of the six named lawyers.

The frequency for cases entered in 1988 and 1989 of the six named lawyers, as well as other sampled lawyers appearing before the three judges and all other judges for OUI cases was tabulated as follows:

TABLE III.C

ATTORNEY [115]	Hurley,J.	Pino,J.	Tierney,C.J.	All Others	Total
Number of Cases					
Percentages					
Atty. Finnerty	2	8	2	4	16
	12.5	50.0	12.5	25.0	
Atty. Flaherty	7	19	4	13	43
	16.3	44.2	9.3	30.2	
Atty.Kenneally	2	6	-	4	12
	16.7	50.0	-	33.3	
Attorney A	11	7	2	11	31
	35.5	22.6	6.5	35.5	
Attorney B	4	2	1	15	22
	18.2	9.1	4.5	68.2	
Attorney C	-	5	2	16	23
		21.7	8.7	69.6	
Attorney D	-	4	-	21	25
		16.0		84.0	
Attorney E	1	4	-	6	11
	9.1	36.4		54.5	
Attorney F	8	16	2	19	45
	17.8	35.6	4.4	42.2	
Attorney G	4	1		9	14
	28.6	7.1	-	54.3	
Attorney H	10	12	2	30	54
	18.5	22.2	3.7	55.6	
Attorney I	2	6	-	14	22
	9.1	27.3		63.6	
Attorney J	14	2	1	10	27
	51.9	7.4	3.7	37.0	
Other	384	510	113	1,285	2,302
	17.1	22.2	4.9	55.8	
Column Total	459	602	129	1,457	2,647
	17.0	22.7	4.9	55.0	100

Number of Missing Observations: 265

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115 The omission of Attorneys LoPresti, DiMasi and Saggese is because they did not have enough OUI cases during these years to analyze. The numbers of cases for each is: LoPresti, 1988(4), 1989(2); DiMasi, 1988(0), 1989(1); Saggese 1988(3), 1989(1)

The above data indicates that, based on percentages, clients Attorneys A, B, G and J were more likely to appear in front of Judge Hurley than clients of Attorneys Finnerty, Flaherty or Kenneally. On the other hand, Attorneys Finnerty, Flaherty and Kenneally had a much higher percentage of their cases in front of Judge Pino than any other individual lawyer or other lawyers in general. Judge Tierney did not appear to hear a statistically significant and greater percentage of OUI cases of Attorneys Flaherty, Finnerty and Kenneally than he did of cases of other lawyers generally. The significance of the foregoing is that to the extent that "judge shopping" by any of the six lawyers mentioned in the Globe series occurs (at least for OUI cases entered in 1988 and 1989), it only appears to favor Judge Pino with a disproportionate number of cases.[116]

4. Analysis of Dispositions for Individual Lawyers and Judges

The remainder of the analysis was directed to the question whether or not the six named lawyers had better results before the three named judges as compared to other lawyers. The analysis compared the six lawyers' results for cases entered during the period 1985-1989 with the general population of attorneys for cases entered during 1988 and 1989 and also attempted to analyze

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116 Any conclusions as to "judge shopping" by the lettered attorneys included in the table are intentionally omitted.

how a group of other attorneys fared.[117] For some lawyers, there were not enough cases to draw any conclusion. The statistical conclusions merely indicate whether a particular series of "good" or "bad" results is different enough from what could be expected of random results to be statistically significant.[118] The cautions set out at the beginning of this section on statistics should be kept in mind and are summarized here again for emphasis. Many factors other than favoritism or preferential treatment could explain non-random results. The quality of lawyering, case selection process by attorney, and innumerable other facts all could explain statistically significant deviations from random. Given this caution, the following statistically significant relationships relevant to this inquiry are disclosed by the figures.

JUDGES

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117 Only OUI cases were considered. Further, for this analysis only OUI first offense dispositions were considered so as to maximize the similarity of between cases.

118 As used in this discussion "statistically significant" and "random" are essentially opposites. "Statistically significant" means, for this inquiry's purposes, that the numerical relationship is one that has a low probability of occurring by chance. "Statistically significant" does not imply the reason for any such numerical relationship. "Random," used as an opposite to "statistically significant," means that the numerical relationship has a probability of occurring by chance.

1. Cases handled by Attorneys Finnerty and Flaherty received more favorable results in front of Judge Tierney than cases handled by other lawyers. Cases handled by Attorney DiMasi received less favorable results in front of Judge Tierney than cases handled by other lawyers.

2. Cases handled by Attorneys DiMasi and Flaherty received more favorable results in front of Judge Pino than cases handled by other lawyers. Cases handled by Attorney A received less favorable results in front of Judge Pino than cases handled by other lawyers.

3. Cases handled by Attorneys F, J, Flaherty and Finnerty received more favorable results in front of Judge Hurley than cases handled by other lawyers. Cases handled by Attorneys A, Kenneally and Saggese received less favorable results in front of Judge Hurley than cases handled by other lawyers.

LAWYERS

1. Cases handled by Attorney F received more favorable results in front of Judge Hurley than cases handled by other lawyers.

2. Cases handled by Attorney J received more favorable results in front of Judge Hurley than cases handled by other lawyers.

3. Cases handled by Attorney Flaherty received more favorable results in front of Judges Hurley, Pino and Tierney than cases handled by other lawyers.

4. Cases handled by Attorney Finnerty received more favorable results in front of Judges Hurley and Tierney than cases handled by other lawyers.

5. Cases handled by Attorney DiMasi received more favorable results in front of Judge Pino than cases handled by other lawyers. Cases handled by Attorney DiMasi received less favorable results in front of Judge Tierney than cases handled by other lawyers.

6. Cases handled by Attorney A received less favorable results in front of Judges Hurley and Pino than cases handled by other lawyers.

7. Cases handled by Attorney Kenneally received less favorable results in front of Judges Hurley and Pino than cases handled by other lawyers. [119]

8. Cases handled by Attorneys Saggese received less favorable results in front of Judge Hurley than cases handled by other lawyers.

9. Cases handled by Attorney LoPresti received less favorable results in front of Judge Pino than cases handled by other lawyers.

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119 For an example of the significant differences between statistical analysis and individual case analysis, compare the statistical finding with the case analyses in Commonwealth v. Kenneally, Section VI. 6 Commonwealth v. Maguire, Section VI. 12 and the Weber cases, Section VI. 15.

All other relationships were random[120] or had a sample size of less than five (including zero) allowing no conclusions to be drawn.

The following tables summarize the data from which the foregoing conclusions were drawn. It should be emphasized that this statistical analysis and the tables are based upon percentages rather than raw numbers. The reason for this is the large difference between the size of the universe (1988 and 1989 OUI first offense cases) compared to each individual attorney's sample.[121]

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120 See note 118 for definitions of "random."

121 Whether or not a relationship was statistically significant was determined in the following way. All cases decided by Chief Justice Tierney and Judges Hurley and Pino (used for comparison purposes) were separated from the other judges' cases. Those decided by a particular judge were then divided by whether it was a particular attorney's case or not and cross-tabulated with the percentage of "good" and "bad" outcomes. Percentage was used to compensate for the fact that a particular attorney might have a sufficient number of cases to analyze, but the total for all the other attorneys' cases might be 60 to 100 times larger. This disparity in number could have influenced the decision of whether or not the relationship was statistically significant. Once the cross-tabulation was accomplished, a chi square statistic was calculated for the table. The commonly accepted level of probability equal to 0.05 was used to make the decision.

The following table illustrates the method.

DISPOSITION Attorney	"Bad"	"Good"
All Others	39	61
Attorney Flaherty N=28	21	79
Column	60	140

TABLE III.D

Chief Justice Tierney

	"Bad"	"Good"
Universe (%)	61	39
Attorney DiMasi	83	17
Attorney Finnerty	25	75
Attorney Flaherty	33	67

TABLE III.E

Judge Pino

	"Bad"	"Good"
Universe (%)	39	61
Attorney DiMasi	0	100
Attorney Flaherty	21	79
Attorney A	80	20

(footnote, continued)

Chi-Square	DF	Significance
7.71429	1	0.00548

Gamma .41265

interpretation: A statistically significant relationship exists.
A detailed discussion of the chi square statistic can be found in Hubert Blalock, Social Statistics (second edition; New York: McGraw-Hill, 1972), chapter 15, and in Sidney Siegel, Nonparametric Statistics for the Behavioral Sciences (New York: McGraw-Hill, 1956), chapter 4.

TABLE III.F

Judge Hurley

	"Bad"	"Good"
Universe (%)	48	52
Attorney F	17	83
Attorney J	29	71
Attorney A	75	25
Attorney Flaherty	31	69
Attorney Finnerty	33	67
Attorney Kenneally	80	20
Attorney Saggese	67	33

Disposition Percentages for Judges and Lawyers

Finally, the overall "good versus bad" outcomes for 1988 and 1989 were tabulated for each BMC judge studied.[122]

TABLE III.G

JUDGE	"Bad"	"Good"	Total
	Number of Cases Percentages		
Hurley, J.	232 52.1	213 47.9	445 20.0
Pino, J.	225 39.1	351 60.9	576 25.9
Tierney, C.J.	63 61.2	40 38.8	103 4.6
Chin, J.	25 32.1	53 67.9	78 3.5
Donovan, J.	130 79.3	34 20.7	164 7.4
Johnson, J.	89 57.1	67 42.9	156 7.0
Kelly, J.	33 51.6	31 48.4	64 2.9
O'Toole, J.	46 39.3	71 60.7	117 5.3
Bakas, J.	108 47.4	120 52.6	228 10.3
Meagher, J.	29 50.9	28 49.1	57 2.6
Dortch, J.	16 59.3	11 40.7	27 1.2
Hershfang, J.	154 74.4	53 25.6	207 9.3
Column Total	1,150 51.8	1,072 48.2	2,222 100.0

122 These two charts include both 1988 and 1989 docket entries for OUI cases. Where there was no disposition, a default or a jury trial, the cases were not included in the chart.

Number of missing and excluded (jury trials and subsequent OUI offenses) observations omitted: 706.

The following chart shows the results achieved by the attorneys studied for OUI cases entered in 1988 and 1989.

TABLE III. H

FINDING

ATTORNEY

Number of cases Percentages	bad	good	Total
Finnerty	3 21.4	11 78.6	14
Flaherty	9 23.1	30 76.9	39
Kenneally	8 66.7	4 33.3	12
Attorney A	20 76.0	6 23.1	26
Attorney B	10 58.8	7 41.2	17
Other	946 52.1	869 47.9	1,815
Attorney C	14 73.7	5 26.3	19
Attorney D	9 52.9	8 47.1	17
Attorney E	6 66.7	3 33.3	9
Attorney F	12 31.6	26 68.4	38
Attorney G	7 58.3	5 41.7	12
Attorney H	16 50.0	16 50.0	32
Attorney I	13 72.2	5 27.8	18
Attorney J	7 29.2	17 70.8	24
Column Total	1,080 51.6	1,012 48.4	2,092 100

Number of missing and excluded (jury trials and subsequent OUI offenses) observations: 838

The foregoing shows that there are marked differences in outcomes between various judges' OUI cases as there are marked differences in results that various attorneys obtain. With respect to the Globe numerical analysis, however critical one may be of its methodology, it suggested a direction of inquiry which was undertaken. The statistical analysis conducted as part of the present inquiry raises some questions of preferential treatment but provides no proof of the same. The statistically significant tendency to "good" results for certain judges with certain lawyers does not in and of itself prove preferential treatment, by any judge. The only way to determine whether an impropriety exists in any particular matter is to develop the facts and circumstances of the case as has been done, in some cases, during this investigation and those matters are set out later in this report. It is the determination here that no conclusion regarding discipline of any lawyer or judge can be drawn on the basis of statistics. Although statistics can raise the question, in this case they cannot provide the answer. One observation that can be made is that a question of preferential treatment has been raised from the "good" results statistics of attorneys who have legislative or other status, while similar results by Attorneys F and J may raise only raise the question of competent lawyering.

IV.

BMC JUDGES OBJECT OF MEDIA ATTENTION

As described in Section I. 3 on methodology, each of the BMC justices sitting during the period of this inquiry testified concerning their knowledge of the subject matter of this administrative inquiry. Except as to matters specifically referred to in this report, there are no findings of impropriety.

However, since the media attention focused on three judges, Chief Justice William J. Tierney, Judge Pino and Judge Hurley, each is covered in a separate section below.

1. Chief Justice William J. Tierney

Chief Justice William J. Tierney graduated from law school and became a member of the bar in 1963. While going to law school he was employed as a City of Boston police officer. After graduating from law school and while still working as a police officer, Judge Tierney spent one year working at the Suffolk County District Attorney's office investigating criminal cases. In 1964 he went into private practice and in 1965 accepted an appointment at the Clerk's Office of the Brookline District Court, continuing to practice law with the exception of criminal cases (as was permitted at the time). In 1978, he was appointed to an administrative position in the Office of the Chief

Administrative Justice. He served in that capacity until November, 1982 when he was sworn in as an Associate Justice, BMC. On May 26, 1988, Judge Tierney was elevated by the Supreme Judicial Court to the position of Administrative Justice (Chief Justice), BMC.

Several people spoken to during this inquiry had high praise for Chief Justice Tierney's administrative abilities, his integrity, his sincere dedication to his responsibilities and his performance as a sitting judge. It also appears that he has the loyalty and respect of his BMC colleagues and staff. In addition, it appears that he has gained the respect of those both within and outside the BMC who have dealt with him in his official capacity.

Chief Justice Tierney has instituted several reforms since he was elevated to his present position in 1988. Among those initiatives have been the prioritizing and setting aside of jury sessions for firearms cases, the setting aside of special sessions to try pre-trial detainees in the Charles Street jail, the establishment of an alternative sentencing program for female defendants, assistance to defendants who have tested HIV positive, centralized administrative orders and directives, together with monthly meetings with divisional heads. Also, Chief Justice Tierney established a system of rotation for the justices of the BMC so as to insure that each justice is fairly assigned on an equal basis to each of the Court's divisions,

civil, primary court for criminal business, and the jury-of-six session.[123] Prior to his becoming Chief Justice, the jury assignments were not made on a rotating or random basis, but rather certain judges were assigned to those sessions more often than others. In addition, Chief Justice Tierney has made efforts to improve probation records in order to assure their accuracy and provide more prompt availability. There are many other examples of Chief Justice Tierney's administrative initiatives.

With regard to the so-called "politically-connected attorneys" referred to in the Globe series, Chief Justice Tierney did contact Mr. DiMasi on one occasion, and that was in 1989. The contact was by telephone from his office at the Court to Mr. DiMasi's office at the State House. The contact involved the proposed legislation to give rule-making authority to the Chief Justice of the BMC rather than having it reside in all justices as a committee of the whole. The bill sought to make the rule-making authority of the BMC similar to other departments of the trial court.[124] Chief Justice Tierney was in favor of the bill, and his call to Mr. DiMasi was to register that position. That call was followed up with a letter to the Chief Administrative Justice informing him of the contact. He never spoke to Mr. DiMasi about the bill in the courthouse. He

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123 See Section II. 11.

124 See Section II. 1.

testified that other than the above contact, he has had no contact with Mr. DiMasi, Mr. LoPresti, Mr. Flaherty, Mr. Saggese, Mr. Kenneally or Mr. Finnerty concerning legislation since he became a judge. Neither has he had any other contact with them, except perhaps to greet them during a casual meeting on the street, in a restaurant or at a social gathering. He also denied any improper contact by any person concerning any case handled by those attorneys and none has been found.

During this inquiry, 26 of Chief Justice Tierney's trial tapes were ordered. Those tapes involved cases handled by the six attorneys whose activities were highlighted in the Globe series. In all instances tapes were located (indicating Chief Justice Tierney's following proper procedures with regard to taping), and the proceedings were reviewed. In addition, Chief Justice Tierney provided this administrative inquiry with transcripts of 46 cases involving the six attorneys and one additional case highlighted in the Globe.[125] The tapes and transcripts revealed that Chief Justice Tierney conducted proceedings in a courteous, professional and businesslike manner. Although some other judge hearing some of the cases may have come to a different conclusion, it was Chief Justice Tierney who heard and observed the witnesses and had the responsibility for determining credibility and drawing the appropriate inferences.

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125 The tapes ordered by the Special Master overlapped with the transcripts provided by Chief Justice Tierney.

A review of Chief Justice Tierney's trial proceedings reveals no impropriety. Some of Chief Justice Tierney's cases highlighted in the Globe series are covered in detail in Section VI of this report.

Chief Justice Tierney testified during this inquiry that he was unaware of the failure of any of the BMC judges to record proceedings. He testified that had he been made aware, he would have taken action. He testified that he did not know until the Globe began requesting tapes that any tapes were missing, and since the appointment of the Special Master occurred soon after the series was published, he deferred taking any action pending the outcome of this administrative inquiry. Chief Justice Tierney testified that he was aware of Judge Hurley's physical problems and limitations, but he was unaware of any emotional problems.

This administrative inquiry finds no improprieties in connection with Chief Justice Tierney's conduct.

At the time this administrative inquiry began, Chief Justice Tierney had been Chief Justice for not quite two and a half years. Many of the problems in the BMC are inherent in its structure and others were inherited. Although there is room for much-needed improvement, especially in case flow management in the jury-of-six session, Chief Justice Tierney deserves credit for his efforts. However, the observation made here is that structural reform is necessary to effect any real and long-lasting improvements.

2. Judge Walter Hurley

Judge Walter Hurley graduated from law school and was admitted to the bar in 1954. Thereafter, he was appointed to two successive judicial clerkships, the first in the state court, the second in the federal court. He served in those clerkships until 1961 when he entered private practice specializing in the defense of criminal cases. Judge Hurley remained in private practice until February 1984 when he was confirmed as Associate Justice, BMC.

Judge Hurley sat frequently in the jury sessions. From 1985 to 1989, he was assigned to those sessions 117 weeks or 45 percent of the time[126]. He has a history of disposing of large numbers of cases when assigned to those sessions. Once again, using OUI cases as a standard, he disposed of 505 such cases for the years 1988 and 1989.[127] He did so even though he suffered from severe illnesses and as a result, lost much work time during that period. During 1989 alone, he was on sick leave for 44 court days and was out another five days on personal leave. (He also took 25 vacation days.) Because of his physical condition, Judge Hurley sat quite often in a "jury" session set aside for pleas and conferences.

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126 See Table II.A in Section II.

127 See Table III.B in Section III.3.

Judge Hurley's available trial tapes for cases handled by the six attorneys highlighted in the Globe series were reviewed. Some of these cases are of concern and are set out here in detail.

In Commonwealth v. Timothy Sheehan (BMC Docket No. 89-5581), the defendant was charged with OUI second offense and two minor civil infractions, failing to keep within marked lanes and disobeying a traffic signal (stop sign). The charges arose out of the defendant's alleged operation of a motor vehicle on August 12, 1990. The defendant was represented by Attorney Michael F. Flaherty. The charges were first brought in the Dorchester District Court, a jury trial claimed in the first instance and the matter removed to the BMC jury trial session. The case was tried, jury-waived, before Judge Hurley on February 8, 1990. The tape of the proceeding reveals that the matter was tried without witnesses on an agreed statement of facts. Assistant District Attorney Mary Orfanello read the agreed statement into the record. The statement consisted of portions of the police report.[128] It appeared to be the only evidence, although Mr. Flaherty did refer to an event that occurred within the motor vehicle at the time the police officer's attention was drawn to

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128 Although the police report stated that the defendant went through a stop sign without stopping, the statement, as read, stated that the defendant "proceeded to a stop sign at the base of Victory Rd.-ah - going around the curve...."

it. It is unclear, however, as to whether or not that matter was part of the stipulation. Mr. Flaherty moved for a finding of "not guilty." There was no argument heard from either counsel. Judge Hurley asked if there were any "police here." When Mr. Flaherty responded in the negative, Judge Hurley dismissed the OUI second offense for want of prosecution, without making a finding on guilt or innocence. However, when asked by the clerk about the two lesser civil offenses, Judge Hurley assessed a $25 fine on each.[129] There appears to be no reasonable explanation on the record as to how a case could be tried on an agreed statement of facts, then dismissed for want of prosecution as to the OUI charge and the defendant found responsible on the lesser charges which arose out of the same incident. Judge Hurley's actions in this case were improper.

In Commonwealth v. Brian McDonough (BMC Docket Nos. 89-5548, 49) the defendant was charged with OUI and leaving the scene of an accident after causing property damage. The case arose out of

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129 The tape reveals that Judge Hurley ordered the matter dismissed without referring to the OUI offense or the lesser charges. Listening to the tape, it appeared that all charges were dismissed. It was not until the clerk questioned Judge Hurley about the minor charges that additional action was taken. The docket reflects that the OUI second offense was dismissed for want of prosecution "no police officers" and the defendant found "responsible" on the civil infractions. Contrary to the docket entries, the District Attorney's file indicates that the defendant was found "not guilty" on the OUI second offense. The District Attorney's file also indicates that the defendant was found "responsible" on the civil charges.

an incident occurring on August 10, 1989. Charges were originally brought in the Dorchester District Court, a jury trial claimed in the first instance and the matter removed to the BMC jury session. The case was tried before Judge Hurley, jury-waived, on November 29th. Attorney Michael F. Flaherty represented the defendant.

The trial tape reveals (see Appendix E for transcript) that when the case was reached for trial, Mr. Flaherty's name was called, and a voice is heard to say "He was here." The defendant's name was then called, and a police officer informed Judge Hurley that the defendant had been in the courtroom. On Judge Hurley's orders, the defendant was summoned from the corridor. When the defendant entered the courtroom, Judge Hurley asked him where his attorney was, and the defendant responded that he had stepped out. On Judge Hurley's orders, the police officer took the stand and was sworn. At that point, Judge Hurley is heard to tell the defendant not to go anywhere and to "stay up here." It appeared that the defendant was attempting to leave the courtroom.[130] Whereupon, without the presence of defendant's counsel, the police officer testified concerning the events surrounding the alleged offenses. At the conclusion of the officer's testimony, Judge Hurley asked the defendant, "What have you got to say for yourself?" The defendant responded that

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130 The context and tone suggest that he was attempting to leave to find his attorney.

he wished to wait for his counsel. Judge Hurley then said that he would not wait. Then Judge Hurley asked the defendant, "Why did you leave the scene of the accident?" The defendant responded to the Judge's question, and Judge Hurley asked an additional question which the defendant answered. Judge Hurley then found facts sufficient to warrant a finding of guilty on the OUI offense, continued the matter without a finding for one year, ordered the defendant to attend an alcohol program and suspended his license for 45 days. Judge Hurley found the defendant not guilty on the charge of leaving the scene of an accident after causing property damage.

There appears to be no reasonable explanation on the record as to why Judge Hurley ordered the case to go forward without the presence of counsel or what excuse there was for interrogating the defendant on the charge of leaving the scene after property damage.[131] Judge Hurley's actions in this case were improper.

The case of Commonwealth v. Edward G. Costley (BMC Docket No. 87-4129-31) was reviewed. The defendant was charged with OUI second (and two related motor vehicle offenses) in the East Boston District Court. The defendant was represented by Attorney Alfred E. Saggese, Jr. A first instance jury trial was claimed which brought the case to the BMC where it was heard before Judge Hurley, jury-waived. The BMC case file indicates

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131 The Assistant District Attorney was present throughout and raised no objection.

Judge Hurley found facts sufficient for a finding of guilty to so much of the complaint as alleged a first OUI offense. However, because no tape recording could be found for this case, it was not possible to determine what occurred that may have formed the reason for, or the propriety of, Judge Hurley's action in reducing the charge. Mr. Saggese, when questioned, could not recall the reason for Judge Hurley's action. Judge Hurley's failure to record the proceeding was improper.

Other cases of concern are Commonwealth v. Steele (BMC Docket No. 86-6417) and Commonwealth v. Maguire (BMC Docket No. 87-1353-56) which are discussed in detail in Section VI of this report.

In addition to the issues presented by the above cases, it also appears that Judge Hurley had more than the expected number of missing tapes. Of the 68 tapes ordered for cases involving the six attorneys named in the Globe series (for trials held during the period the tapes are still preserved), 23 were found to be missing. That number of omissions cannot be explained by the number of tapes expected to be missing through inadvertence or technical problems[132]. The missing tapes included 4 in 1986, 5 in 1987, 5 in 1988, 8 in 1989 and 1 in 1990. In addition, a random tape search of Judge Hurley's cases was conducted. A search for 17 of Judge Hurley's cases for 1988 and 1989 revealed

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132 See Section II. 16.

that 7 were missing, about the same proportion of missing tapes as in the original sample. A finding is made here that Judge Hurley has acted improperly in failing to record all required proceedings.

On November 23, 1990, an attempt was made to take Judge Hurley's sworn testimony. The questioning proceeded for a short time when, at the request of Judge Hurley's counsel, it was discontinued because of concern for the Judge's health. The matter was continued to another day, but never resumed because of information provided by Judge Hurley's physician to the effect that doing so would create serious risk to Judge Hurley's health. The physician further stated that in light of Judge Hurley's medical history and the medications necessary for the treatment of his multiple health problems, it was the physician's "strong suspicion" that answers to any detailed questions would be "guesses." After receiving the information from Judge Hurley's physician, a decision was made not to attempt further interrogation and to report the matter on the basis of available information. Also provided to this inquiry, were several of Judge Hurley's hospital records.

It may very well be that many, or all, of the irregularities that are the subject of this report concerning Judge Hurley may be explainable by his physical and emotional condition. According to his physician, Judge Hurley suffers from a variety of physical and emotional problems. His medical condition has

resulted in several hospitalizations since January of 1989. According to Judge Hurley's physician; several of these illnesses are life-threatening, progressive and irreversible; Judge Hurley is so severely impaired by reason of those inter-related illnesses that he is physically disabled from continuing his duties on the court; and his condition will prevent his returning. Judge Hurley is presently on sick leave and has been out all of this year.[133]

3. Judge John A. Pino

Judge John A. Pino graduated from law school in 1950 and was admitted to the bar in April, 1951. He worked in the claims department of an insurance company until 1953 when he entered private practice. From 1956 to 1958 he was a member of the Voluntary Defender's Committee representing indigent defendants in criminal matters. From 1958 to 1968 he was an assistant district attorney, Suffolk County. From 1968 to 1979 Judge Pino was in private practice, focusing primarily on the trial of criminal cases. He became an Associate Justice BMC, in December, 1979.

After his appointment to the bench, Judge Pino became active in the Massachusetts Judges' Conference. He became an officer of

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133 He also had 120 days of sick leave during 1990 (in addition to taking 34 vacation days and four days of personal leave).

that organization, rising to the office of president and is presently a member of its Executive Board. The organization was formed before he became a justice, and, although it has no official status does, according to Judge Pino, speak for a majority of Massachusetts judges. The organization holds statewide meetings, to which all judges are invited. The Judges' Conference represents all departments of The Trial Court, the Executive Committee having one judicial member for each department. Judge Pino described the goal of the organization as being the improvement of the court system. The organization also deals with judicial working conditions, salaries and benefits. It was in his capacity as an officer in the Judges' Conference that Judge Pino has found himself involved in legislative matters. Members of the conference, including Judge Pino, would communicate individually with their own legislator. He denied, however, ever having contacted a member of the legislature, other than his own, without that contact having been part of a committee made up of himself and others. He also appeared before the Joint Judiciary Committee of the Massachusetts Legislature on occasion with reference to bills in which the Massachusetts Judges' Conference had an interest.

With regard to the six attorneys mentioned in the Globe series, Judge Pino testified that he had a "vague recollection" of discussing "procedures" with Mr. Kenneally not more than twice during the past six years. That contact would have taken place

at Mr. Kenneally's office at the State House. He testified that during that same period, he had no contact with Mr. Finnerty on any legislative matter. He stated that he had no memory of any contact with Mr. Saggese on legislative matters. With regard to Mr. LoPresti, Judge Pino stated that he never called him and did not believe that he ever saw him at the State House. Judge Pino testified that after becoming a judge, he did deal with Mr. Flaherty who sponsored many of the bills for the Judges' Conference. He testified that he had no contact with Mr. DiMasi, unless he was present on a committee at the time he appeared on a bill. Judge Pino stated that he has never seen a legislator regarding a legislative matter at the courthouse. Any contact he had with any member of the legislature was at the State House. Judge Pino testified that other than the contacts summarized here, he has not made contact with any of the six lawyers referred to in the Globe series by telephone or otherwise with reference to legislation.

Judge Pino denied any contact with any person regarding a case pending before the Court, other than in open court with all parties present.

Judge Pino prides himself on being able to dispose of large numbers of cases. It is his opinion that when he sits in the jury session, he disposes of more cases than any other judge presently sitting in the BMC. The statistics appear to confirm his assessment. At least one factor contributing to the number

of cases disposed of by Judge Pino is the frequency with which he sat in the jury-of-six sessions during the period covered by this inquiry. For example, for the period 1985 to 1989, he sat in those sessions 113 weeks or 43.5 percent of the time[134] For cases entered during the period 1988-1989, he disposed of 663 OUI cases, more than any other BMC judge[135] (OUI cases are used here, as in other parts of this report, as a barometer).

Also contributing to Judge Pino's high disposition rate in the jury sessions was his insistence that all cases assigned to him be conferenced together with the manner in which the conferences were conducted. He testified that during the conference, he would listen to the allegations of the attorneys, and sometimes hear unsworn testimony or comments from police officers or other witnesses. He would then indicate to counsel his inclination on guilt or innocence. In general, his style (gleaned from listening to some proceedings recorded in the Assignment Session) was to be aggressive and outspoken. By involving himself in that manner, he was able to dispose of many cases. His practice when sitting in the Assignment Session, was to call the list, conference cases on request, assign cases to sessions and then try to resolve cases by conference that

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134 See Table II. A in Section II. 11.

135 See Table III. B in Section III. 3. This represents 22.9% of all BMC jury-of-six OUI dispositions for cases entered 1988-1989.

otherwise would have to be put over to another day because not enough sessions were available. His motivation was obviously to close as many cases as possible. In fact, many attorneys would "judge shop" to seek him out in order to have him conference and dispose of their cases.

There are, however, other factors that appear to influence the number of cases disposed of by Judge Pino. He has taken it upon himself to ignore established rules and requirements and abbreviate the proceedings. In order to prevent this fact from becoming known, he purposely caused most of the proceedings before him in the jury session not to be recorded. This fact came to light when, as part of this inquiry, tapes for Judge Pino's cases were ordered (as were those of other judges) so that they might be reviewed, especially those tapes involving the attorneys alleged in the Boston Globe series as having received preferential treatment.[136] It soon appeared that most of Judge Pino's cases were unavailable. This fact, itself, thereupon became the subject of inquiry. Initially, a total of 62 tapes were requested for cases heard by Judge Pino, those being for cases handled by the six attorneys subject to the media

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136 The Globe series also noted that a number of the tapes ordered for Judge Pino's cases were not available.

attention. In only 17 cases were tapes found to exist.[137] The more serious question then became apparent -- exactly what was occurring during the proceedings handled by Judge Pino? It is impossible to obtain the complete answer to the question. When confronted with the fact of unavailable tapes during his testimony, Judge Pino did admit to the practice of intentionally not recording cases in the jury-of-six sessions. His stated practice was to record all matters in the BMC primary criminal sessions and the civil sessions. He testified that he also recorded the proceedings when he sat in the jury Assignment Session. In addition, he testified that he recorded actual jury trials, but most other matters in the jury session (including bench trials, guilty pleas and admissions) were, on his instructions to the clerk, not recorded.

On a typical day, Judge Pino would begin the court day in the jury session (with the exception of the Assignment Session) without the recording device being on, conference cases and order the disposition without a record of what transpired in the majority of cases. It was his practice to order the recording device not be turned on and to remain off unless he made a determination to record a particular matter. In fact, there were

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137 Only tapes subsequent to January 20, 1986 are included. Tapes prior to that date were erased in accordance with Rule 308, Spec. R. BMC (Civil) and Rule 15, Spec. R. BMC (Crim.). See Section II. 16.

occasions when entire court days would go by and many cases disposed of without a single word on tape.

Judge Pino's description of what occurred in proceedings when the recording device was off is not easy to understand, let alone set out. Any possibility of understanding what occurred in Judge Pino's session when the tape was not running is dependent upon his description of the procedures he claimed to have followed. When sitting in the jury session, he insisted that all cases be conferenced. For about the last five years, these conferences have been held at the side bar, rather than in a conference room.[138] He then serially disposed of each case following the conference before calling the next case. According to Judge Pino, calling the cases in that fashion saved time by keeping all attorneys and witnesses in the courtroom close at hand.

It was during the conferences that Judge Pino, after listening to both counsel (and usually the police in OUI cases), tended to make up his mind on guilt or innocence. He testified that he had "a pretty good idea" of guilt or innocence by the end of the conference. He testified that if, after the conference, he felt that a defendant would be found guilty, he then ordered the taping of evidence, although he has found defendants guilty

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138 He would, sometimes, alter the procedure which may explain why some attorneys questioned recalled conferences being held in a separate room.

without ordering the matter recorded. He testified that since he notified counsel at the conference of his prediction of his finding on guilt or innocence, he would record the proceeding if counsel disagreed with his prediction. However, it was not possible to document any such occurrence or admonition. He testified that in cases where the prediction was not-guilty, he did not order the matter recorded. If, however, he predicted a not-guilty finding and after hearing evidence felt that the finding should be guilty, he testified that he would stop the proceeding, give the defendant an opportunity to have a mistrial, go to another judge, have a jury trial or accept the finding of guilty. Once again, if any such instance occurred, it could not be documented. Even Judge Pino agreed it could not have happened very often. [139]

This complex "system" of when to, or not to record proceedings appears to be dependent on Judge Pino's ability to predict results on what he is told at the conference before hearing sworn testimony. Of course, in those cases where the disposition was the result of an agreed upon recommendation accompanied by a plea of guilty or admission, the matter was not recorded. Dismissals also were not usually recorded, unless by chance the machine happened to be running at the time.

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139 According to Judge Pino "once [he] figured out that the interest of the defendant, didn't require it" he would not record the proceedings.

The fact is, that the majority of cases disposed of by Judge Pino in the jury-of-six session have not been recorded because he ordered them not to be. Judge Pino admitted not advising attorneys before him that matters were not being recorded. The attorneys and assistant district attorneys who were asked during this inquiry, stated that they believed that the proceedings in open court were being recorded and if they thought otherwise, they would have requested that the machine be turned on.

Since Judge Pino testified that he taped the proceedings in the assignment session, some of those tapes were reviewed. What appears to have occurred was that findings were being made after a side bar bench conference that was not public and which was conducted in a way not to be picked up in a regular fashion by the recording device. After the conference the Clerk would announce the result; in one case the finding announced was guilty, in another a finding of guilty after a plea of guilty, and in another the facts were held sufficient for a finding of guilty and the case continued without a finding. There was nothing, however heard on the tape to enable one to make a determination as to what actually took place. Since the sample cases occurred in the assignment session, they probably resulted from an agreed-upon recommendation. However, it is impossible to tell.[140] In those cases, the conference then became the

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140 See Tape No. 8554, December 20, 1988. Judge Pino was in the Assignment Session on that day.

"proceeding."

Since a majority of Judge Pino's cases were not recorded, it is impossible to determine in how many cases this had occurred, what evidence was or was not introduced or what procedure was used. It is, in fact, impossible to determine at this point exactly what did occur or why.

Judge Pino also testified that he did away with the requirement of determining, through a colloquy, if a defendant had voluntarily and knowingly entered a guilty plea, admitted to sufficient facts for a finding of guilty or had waived the constitutional right to trial by jury.[141] By not recording those

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141 In order to ensure that a waiver of the right to trial by jury is made freely and knowingly, there must be a written waiver. Mass. R. Crim. P. 19(a). In addition, there must be a colloquy between the judge and the defendant at which time:

> ...the judge might state that the jury consists of members of the community, that the defendant may participate in their selection, that the verdict of the jury must be unanimous, that they decide guilt or innocence while the judge makes ruling of law in the course of the trial, instructs the jury on the law, and imposes sentence in case of guilt; and that, where a jury is waived, the judge alone decides guilt or innocence in accordance with the facts and the law. The judge should make sure that the defendant has conferred with his counsel about the waiver, and that he has not been pressured or cajoled and is not intoxicated or otherwise rendered incapable of rational judgment....

Ciummei v. Commonwealth, 378 Mass. 504, 510 (1979).

Where there is an admission to sufficient facts at the jury-of-six level, the following is required:

1. A written waiver of the right to trial by jury and the colloquy required by Ciummei v. Commonwealth, supra.
2. A written stipulation of the facts should be

matters, he avoids having to follow the required procedure.

(footnote, continued)
filed with the case papers.

3. The judge should be satisfied that a factual basis for a guilty finding exists.

4. The judge should inform the defendant that the defendant, by admitting to sufficient facts, is waiving the right to confront and cross-examine witnesses and to call witnesses on his own behalf if the condition of any continuance is violated (unless that right is preserved by the defendant).

5. If the defendant indicates that he or she understands the rights involved and wishes to waive them, the admission to sufficient facts may be entered on the record. Commonwealth v. Duquette, 386 Mass. 834, 845 (1982).

The procedure to be followed for a hearing to in connection with a guilty plea is set forth in Rule 12(c) of the Mass. R. Crim. P. This rule requires that the judge determine that the pleas is voluntary and that there is a factual basis for the charge. The rule also requires the following:

1. The judge shall ask about the existence of any agreements.

2. The judge must inform the defendant that if there were any recommendations contingent upon the offer of the plea, that the judge will not impose a harsher sentence without first providing the defendant with an opportunity to withdraw the plea.

3. The defendant must be informed that by pleading guilty, the defendant is waiving the right to trial with or without a jury, the right to confront witnesses, and the privilege against self-incrimination.

4. The defendant must be informed of the maximum sentence possible, and any mandatory minimum sentence which may be applicable.

There may be additional requirements imposed by statute or case law in connection with the acceptance of a guilty plea. See, e.g., G.L. c. 278, §29D concerning possible deportation, exclusion from admission into the United States, or denial of naturalization.

Recording cases would have revealed what he was doing.[142] Judge Pino therefore failed to give the colloquy in all or nearly all the cases that he ordered not to be recorded. Since the beginning of 1986, those cases would have comprised a majority of the matters handled by Judge Pino in the jury session.

Judge Pino justified his practice of not recording cases and doing away with the colloquy on the ground that it saved time and therefore allowed for the disposition of more cases.[143]

Of the 45 out of 62[144] cases of Judge Pino from the jury-of-six session that were found not to exist, 22 were findings of not guilty. There were also 13 findings of guilty in cases without tapes. Eight were dismissed (four for want of prosecution) and in two, the Court found facts sufficient for a finding of guilty and continued the matter without a finding.

Although it was not practical to audit all Judge Pino's cases since the beginning of 1986 with reference to taping (tapes prior to that time were erased in accordance with the court rule), it is obvious according to the sampling and his testimony

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142 "If I ran the tape, I have to ask every one of those questions because the SJC someday will see it, 'Oh, Pino didn't do it right.'"

143 According to Judge Pino, "The problem is moving cases in a limited amount of time. It takes shortcuts." Further, "I eliminate a lot of the technicalities of dotting the I's and crossing the t's in order to get a just result that much quicker."

144 These 62 involved the six lawyers described in the Globe series.

that jury-waived trials in the jury-of-six session were held without a recording in many matters where there was no agreement by the parties as to a recommended disposition.

Judge Pino testified that his practice of failing to record cases was not done selectively in cases involving certain attorneys or parties. A random tape search of Judge Pino's cases was conducted. A search for 25 of Judge Pino's cases for 1988 (not involving the six lawyers) revealed that 16 were missing (in a few, fragments were found, such as the call of the case, but nothing else). It therefore appears, at least from that small survey, that Judge Pino's practice was applied generally, although without checking all cases, it would be impossible to determine if any trends exist.

A finding is made here that Judge Pino has acted improperly in intentionally failing to record all required proceedings, and intentionally failing to engage in the required colloquies with defendants before accepting waivers of trial by jury, pleas of guilty and admissions to sufficient facts for a finding of guilty. Other matters concerning Judge Pino's conduct in specific cases are found later in Section VI of this report.

V.

SIX ATTORNEYS OBJECT OF MEDIA ATTENTION

The six attorneys who were described in the Globe as "politically-connected" were questioned individually during this inquiry in order to learn about the nature of their law practice, their actions in the BMC, their relationship, if any, with the judges and other personnel of the BMC, and how their cases were handled in the BMC. Specific questions were asked of the attorneys concerning individual cases which they handled in the BMC, both those identified in the Globe series and others that were deemed to be in need of clarification.

1. George V. Kenneally, Jr.

George V. Kenneally, Jr. graduated from law school in 1956 and became a member of the bar in 1957, and in the in the same year was elected to the Massachusetts House of Representatives. He served in the House of Representatives for six years and then served for nine years in the Massachusetts Senate. In 1972, he was appointed as assistant counsel to the Senate. Later, he was appointed associate counsel to the Senate which is his present position. There is no one presently in the office of Senate Counsel senior to him. The Senate Counsel's office handles "all bills that go into third reading...[to]...make them technologically and legally correct."

Mr. Kenneally testified that while he was in the legislature, he also maintained an office for the practice of

law, first in Dorchester, then in Boston. The last time he maintained a law office office was when he became Senate counsel. He testified that there is no prohibition against his practice of law while working in the Senate Counsel's office. He testified that since 1972, he has handled mostly small cases, "people who might have got arrested that knew me because of my political background." He represented clients in lower courts and would not take a case that was lengthy.

Mr. Kenneally testified that he has maintained all his files for all his cases since 1980. These are kept in the Senate Counsel's office. His best estimate of the number of cases he handled over the last ten years is 50. The bulk of these cases were in the BMC. Ninety percent of his cases were OUI, and he took most of them to the BMC with a first instance jury claim. He has not tried a case to a jury since 1972. He testified that he could get as good a trial in the BMC with a judge as with a jury, and that he had the same chance with each judge of the BMC.

He testified that since 1985, he has not had any discussions with any BMC justice pertaining to legislation.[145] He testified that he did not believe that such a conversation would be proper even though he does not vote on legislation.

Mr. Kenneally testified that he avoids appearing before Chief Justice Tierney for the disposition of a case. The reason

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145 However, see Section IV. 3 on Judge Pino.

that he gave for not appearing before Chief Justice Tierney was his claim that he knew Chief Justice Tierney too well.

Mr. Kenneally testified that he "knows" almost all the other BMC judges somewhat, but not on a personal basis. He knows Judge Hurley and Judge Pino well. He met Judge Pino when the judge was an assistant district attorney and they had cases against one another. They do not have a social relationship.

Mr. Kenneally testified that he believes that most of his BMC cases were heard before Judge Pino and Judge Hurley because they most frequently sat in the Assignment Session. Aside from avoiding Chief Justice Tierney, Mr. Kenneally denied doing anything in any way to influence his appearance before Judge Pino and Judge Hurley, rather than other judges. Mr. Kenneally denied speaking to any BMC judge about any pending case from 1980 to present other than in open court with other counsel present.[146]

Mr. Kenneally was questioned concerning several specific cases he had handled. These are the cases Commonealth v. Kenneally, Commonwealth v. Maguire and Commonwealth v. Weber (two cases), which are discussed elsewhere in this report. These cases are of considerable concern and together with Mr. Kenneally's testimony with regard to them, are discussed elsewhere in this report.

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146 But see Section VI. 15 concerning Commonwealth v. Weber, BMC Docket No. 256390.

Mr. Kenneally was also questioned concerning several other specific cases which he handled in the BMC. There is no indication of any impropriety in those matters, and they are therefore not reported.

Recommendations regarding Attorney George Kenneally, Jr. are contained in Section VII of this report.

2. Salvatore F. DiMasi

Salvatore DiMasi became a member of the Massachusetts bar in 1971 and entered private practice at that time. He shared office space in Brookline with another attorney, and accepted court appointments and practiced in the areas of criminal and probate law. He became an assistant district attorney in Suffolk County in 1973, where he served until 1976, and prosecuted cases in the district courts throughout Suffolk County. He testified that he also prosecuted murder cases in Superior Court. He testified that in 1976, he opened an office in Boston and specialized in defense of criminal defense cases, receiving appointed cases in both the District Courts and the Superior Court. In 1979, he moved his practice to 11 Beacon Street in Boston, where he shared space with other attorneys, and in 1989 he moved his office to its current location at 50 Beacon Street. He stated that he has a general civil and criminal practice, and has defended "hundreds if not thousands of criminal cases," including criminal appeals in the Appeals Court and Supreme Judicial Court.

Mr. DiMasi has served as a state representative from the Third Suffolk District since January of 1979. He testified that he is currently the House Chairman of the Judiciary Committee, a position he has held since 1988, and served as a member of that committee from 1979 to 1982.[147] He also serves as Chairman of the Uniform Sentencing Commission, a special legislative commission composed of members of the House and Senate to which he was first appointed in 1985. From 1985 to 1988 Mr. DiMasi served as Chairman of the Joint Committee on Criminal Justice.

Mr. DiMasi testified that since January 1, 1985 he has not employed any attorneys in his law practice. He has been associated with various lawyers during this time period, and shared work on a regular basis with several attorneys he named, including Stephen Topazio. Mr. Topazio currently shares office space with Mr. DiMasi at 50 Beacon Street. Mr. DiMasi estimated that during the five-year period covered in this investigation, in the vicinity of 70-75% of his practice consisted of criminal cases. He testified that he handles "hundreds" of cases per year in all the courts located in the Greater Boston area, but could not estimate, without examining all of his records, the frequency with which he appeared in the BMC. Mr. DiMasi testified that he has handled many OUI cases, and feels that he has an expertise in that area. He testified that he has handled a greater percentage

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147 The Judiciary Committee is a joint committee. The Senate chairman is Michael LoPresti. See Section V.3.

of OUI cases in the BMC jury-of-six session than any other type of criminal matter.

Mr.DiMasi stated that he believed that all trials and dispositions of cases in which he was involved in the BMC were recorded. To his knowledge, the tape recorder was never shut off during any of his matters. He testified that he never took any action to influence which judge might be hearing any of his cases. When asked about the large number of cases which either he or his associate had before Chief Justice Tierney, Judge Pino and Judge Hurley, as reported by the Globe, Mr. DiMasi indicated that the numbers do not take into account the frequency with which those judges were sitting in the jury-of-six session.

Mr. DiMasi testified concerning his relationship with the judges of the BMC. He had no relationship with Judge Pino or Judge Hurley prior to their becoming judges. He did have some dealings with Chief Justice Tierney prior to his becoming a judge during the time when Chief Justice Tierney was employed in Chief Justice Mason's office as a legislative liaison. These dealings concerned legislative matters which affected the courts. Since 1985, he has had no communications with any judges of the BMC concerning pending cases other than in open court and in the presence of all counsel.

With regard to communications with judges regarding legislative matters, Mr. DiMasi testified that in his capacity as House Chairman of Judiciary and as a legislator, he has had

communications with judges from the trial courts, with the Chief Administrative Justice's office, with the Appeals Court, and with the Supreme Judicial Court concerning pending legislation. These may have been in the form of testimony by a judge before a committee, by written communication, or by telephone. Mr. DiMasi noted that there is no prohibition against such communications. With regard to communications with judges of the BMC regarding legislative matters, he testified that he had received a communication from the Chief Justice of the BMC concerning rule-making authority in that court. Mr. DiMasi stated that he believed that Chief Justice Tierney indicated that "he thought he should have the same authority that other presiding justices at other district courts should have." He also may have solicited in writing the opinions of the other judges of the BMC with regard to the bill concerning rule-making in the BMC. He testified that he recalls no other communications with BMC judges relating to legislation.

Mr. DiMasi was questioned about the case involving the defendant Katherine Stacy, which was mentioned in the Globe on September 25, 1990. The Stacy case is discussed at Section IV. 11 of this report.

There were several other BMC cases which were also discussed with Mr. DiMasi. Mr. DiMasi's answers, together with a review of these cases and the Stacy case, reveal no improprieties on the part of Mr. DiMasi.

This investigation has revealed no improper conduct on Mr. DiMasi's part.

3. Michael LoPresti, Jr.

Michael LoPresti, Jr. graduated law school in 1973 and was admitted to the bar in 1974. He was elected to the Massachusetts Senate in September, 1973. He has been Senate Chairman of the Joint Senate-House Committee on the Judiciary for ten years and is also a member of the Senate Committees on Insurance, Ethics, Energy and Ways and Means.

He has been in the private practice of law since his admission to the Massachusetts bar. He has a general practice with one associate. Twenty percent of his practice is criminal, and the remainder is made up of general practice. He testified that he does not practice in areas such as administrative law since he is restricted from doing so as a legislator. Although he testified that he is permitted to practice before the Industrial Accident Board, he does not do so because of the appearance it creates.

He has tried jury cases, both civil and criminal, in Suffolk, Essex and Middlesex Counties during the last ten years. The courts that he most frequently appears in are the BMC, the District Court in Cambridge, the District and Probate Courts in Dedham and Salem, with the BMC and Cambridge jury-of-six sessions most frequent among these. In the BMC, the types of criminal

cases he most frequently handles are OUI and drug-related matters.

He testified that during the five-year period from 1985-1989, according to his records, he had 21 cases in the BMC jury session. Of these, seven were before Judge Pino, five before Judge Donovan, three before Judge Hurley, three before Judge Feeney, and one each before Judges O'Toole, Meagher and Johnson.

He testified that he knew two of the BMC judges before they were on the bench: Chief Justice Tierney and Judge Donovan. He knew Chief Justice Tierney from his work with the Chief Administrative Justice of the Trial Court. Chief Justice Tierney appeared before the Judiciary Committee accompanying the Chief Administrative Justice. Mr. LoPresti did not work with him on legislative matters before he became a judge. He testified that he knew Judge Donovan from the judge's work as an assistant clerk in the BMC.

Mr. LoPresti testified that he does not know any of the BMC judges socially. No BMC judge has ever referred a case to him. The only BMC judge that he dealt with formally on legislative matters was Chief Justice Feeney in his capacity as head of a judges' organization. However, he testified that he has probably "chatted" informally with other BMC judges regarding legislation, but does not have any specific memory of which judge or what legislative matters. He did not speak to any BMC judge about the bill resulting in Chief Justice Tierney having rule-making

authority. He testified that he has not discussed any matter pending before the BMC with any judge of the BMC other than in open court with both counsel present.

Mr. LoPresti testified concerning several of his BMC cases. One of his cases, Commonwealth v. Fagone, is discussed at Section VI of this report. He testified that he assumed that every case he tried or which was disposed of in the BMC from 1980 to present was tape recorded.

The investigation has revealed no improper conduct on Mr. LoPresti's part.

4. Thomas E. Finnerty

Thomas E. Finnerty has been a member of the Massachusetts bar since 1960. From 1960 to 1962, he served as an associate in a law firm in Boston. Mr. Finnerty testified that in 1962 he set up a law partnership with Attorney William M. Bulger in Boston which lasted until 1974. From 1963 until 1972, Mr. Finnerty also served as an assistant district attorney in Suffolk County, a position which at the time was part-time and allowed him to maintain a private law practice. In 1974, Mr. Finnerty was elected District Attorney in Plymouth County. He served in that capacity until 1979, and then returned to Boston to reestablish a law partnership with Mr. Bulger. The partnership with Mr. Bulger lasted for approximately one year. After the partnership with Mr. Bulger ended, Mr. Finnerty formed a professional corporation,

and has been practicing law in that capacity to the present. Mr. Finnerty's present law office is located at 1 State Street in Boston.

Mr. Finnerty testified that he currently employs two attorneys, Stephen Foley and Henry Cashman. Mr. Foley had served as Assistant District Attorney in Suffolk County and left that position in September of 1988 to join Mr. Finnerty's office. Mr. Cashman, who had served as an Assistant District Attorney in Plymouth County, joined Mr. Finnerty's office in 1982. Mr. Finnerty also employed William Bulger, Jr. for a short period of time while Mr. Bulger was in law school.[148] There have been other attorneys employed by Mr. Finnerty over the years, and there are attorneys with whom he has shared and currently shares office space.

Mr. Finnerty testified that since 1980, his practice has consisted primarily of litigation and real estate. He has handled real estate closings for a bank, real estate development, insurance defense work, and criminal matters. He summarized his practice by stating that he was "a trial lawyer who has also done some real estate work; but I am more comfortable in a criminal trial court than anywhere else...." His criminal defense work was done primarily in Suffolk, Middlesex, Plymouth, and Barnstable Counties. Although he does not believe that a

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148 William Bulger, Jr. graduated from law school in 1987.

majority of his criminal defense work was done in the BMC, he appeared in the District Courts more frequently than in the Superior Court, and appeared in the BMC more often than in any other District Court. Of the criminal cases he has handled in the BMC since 1985, "a lot" has consisted of OUI cases. He has a reputation of being a competent and skilled trial lawyer.

With regard to any relationship which Mr. Finnerty may have had with judges of the BMC, Mr. Finnerty testified that he had been acquainted with Judge Pino when they were both assistant district attorneys in Suffolk County. He testified that he did not know Judge Hurley prior to his becoming a judge. He also stated that he did not know Chief Justice Tierney. He testified that since 1980, he has had no communications with any judges of the BMC concerning pending cases other than in open court. He testified that he can recall no contact since 1980 with any judge of the BMC regarding a pending or proposed legislative matter.

With regard to the newspaper allegation that a certain proportion of his cases were heard before only three justices of the BMC, Mr. Finnerty testified that he would be "surprised if the majority of...[his] cases were before those three," although he was unsure as to the proportion if cases handled by his employees were also included. He testified that he never took any actions to influence which judge might be hearing any case that that he or his employees handled. When shown statistics

indicating that he or his employees had 31 of 54 cases in the BMC disposed of before Judges Tierney, Pino, and Hurley, Mr. Finnerty concluded that "those three judges were in on the trial sessions a lot."

Mr. Finnerty testified that he believed that all final dispositions in his cases in the BMC had been tape recorded, as required. With regard to OUI cases in general, his experience has been that he obtains many not guilty findings in jury cases, which results are influenced by his ability.

Mr. Finnerty was asked about the case of Commonwealth v. Steele, one of the cases about which the Globe wrote in its series.[149] Mr. Finnerty testified that he did not represent Mr. Steele in this matter. His employee, Attorney Henry Cashman, represented the defendant, Mr. Steele, in the BMC.

Questions were asked about other cases which Mr. Finnerty handled in the BMC. It appears that there were no improprieties in connection with these cases.

This investigation has revealed no improper conduct on Mr. Finnerty's part.

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149 This case is discussed at Section VI. 13.

5. Alfred E. Saggese, Jr.

Alfred E. Saggese, Jr. has been a member of the Massachusetts bar since 1972 and is a resident of Winthrop. His first legal position after becoming a member of the bar was as an assistant district attorney in Suffolk County. He testified that as an assistant district attorney, he prosecuted felony cases, drafted from 35-40 briefs, and argued before the Supreme Judicial Court on "five to ten" occasions. He left the district attorney's office in 1974 or 1975 when he ran for public office. He was elected as a state representative in 1975 from his home district, which at that time covered Winthrop and East Boston. He served in the state legislature continuously from 1975 until 1991. He decided not to run for reelection in 1990. Mr. Saggese also testified that he maintains a private law practice which he began while he served as an assistant district attorney (which was then permitted). He stated that he maintained a "full-time law practice" specializing in criminal law and trial work while serving as a state legislator. He testified that he taught courses, on a part-time basis, at a law school on the topics of appellate brief writing and legal writing.

In the legislature, Mr. Saggese has served on various committees and has served as Vice Chairman of the Committee on Public Service and as Vice Chairman and then Chairman of the Committee on Bills in Third Reading.

Mr. Saggese testified that he currently maintains two law offices. His primary office is at 11 Beacon Street in Boston and his second office is located in Winthrop. Prior to moving to 11 Beacon Street in 1990, his Boston office was located for eight or nine years at 1 Court Street. He stated that he has never practiced law in a partnership, but has been part of an association of various lawyers with whom he has shared overhead since January 1, 1985. At one time he did employ for a short time one lawyer.

With regard to the nature of his law practice, Mr. Saggese indicated that since January 1, 1985, a major portion of his work has consisted of criminal defense. He also specializes in personal injury work. In recent years, he has tried to do more civil work than criminal. During this period, he estimates that of his district court criminal cases, approximately one half were disposed of at the primary court level, and in the other half, he claimed a first-instance jury trial. In the cases which were tried at the primary court level, he estimates that he may have lost and claimed a trial de novo 5% to 10% of the time.

During the five-year period covered by the Globe survey, Mr. Saggese had 33 cases in the BMC jury-of-six session, and a majority of them (17) were OUI cases. He stated that in a first-time OUI case, where there were no aggravating circumstances and no accident, the common disposition in the BMC, both for other lawyers as well as himself, was continuance without a finding,

assignment to an alcohol treatment program, and loss of license (the so-called "24D" disposition).

Mr. Saggese testified concerning his relationship with the three BMC judges who were the subject of the Globe series. He knew Judge Hurley when Judge Hurley was a defense attorney and Mr. Saggese was an assistant district attorney, but the relationship was merely one where Saggese would say "hello." Mr. Saggese knew Chief Justice Tierney when he (Chief Justice Tierney) was in private practice and when he worked in the Chief Administrative Justice's office. He testified that the nature of his relationship with Chief Justice Tierney was casual. He discussed his relationship with Judge Pino prior to his assuming the bench as being similar. He stated that he has never had a social relationship with any of the three.

Mr. Saggese testified that he has had no communication with any judges of the BMC concerning pending cases other than in open court with all counsel present. With regard to communication with BMC judges regarding legislative matters, he testified that he recalls some communication with a former Chief Justice of the BMC concerning legislative matters. He also testified that he had a discussion with Judge Pino, but could not recall whether or not this discussion was with reference to court-related legislation.

When asked to comment about the high number of his cases which were before Judge Hurley (approximately one-half), Mr.

Saggese expressed surprise, and attributed this statistic to the fact that those cases were "relatively short matters, perhaps pleas of guilty or admissions." He noted that his longer trials were before other judges of the BMC (Judge Kelly and Judge Donovan). He also thought that Chief Justice Tierney, Judge Pino, and Judge Hurley "were working the hardest...handling the most cases." Mr. Saggese also commented he had lost a large number of the cases which were heard by Judge Hurley.[150] Mr. Saggese stated that he never took any action to influence which judge heard any of his cases.

Mr. Saggese testified that he believed that all final dispositions in this case in the BMC had been tape recorded and that he never had any incidation that a proceeding was not being recorded.

Questions were also directed to Mr. Saggese concerning several specific cases which he had handled in the BMC.[151] His answers, together with a review of his cases revealed no impropriety in those cases. This investigation has revealed no improper conduct on Mr. Saggese's part.

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150 Mr. Saggese testified that he counted a "continuance without a finding" as a loss if he tried the case "with the expectation of not guilty and the judge found sufficient facts and continued the case without a finding."

151 The case involving James Forziati, which was mentioned in the Globe series, is discussed at Section VI. 1.

6. Michael F. Flaherty

Michael F. Flaherty graduated from law school in 1968 and was admitted to the bar in 1970. He has been a sole practitioner since 1970.

Mr. Flaherty was elected to the Massachusetts House of Representatives in 1966 and served from 1967 to January, 1991. His committee memberships have included Insurance, Public Service, Rules and Public Welfare. In addition he was a member of the Joint Senate-House Judiciary Committee and served as its House Chairman for ten years, and during the last five years as Vice-Chairman.

For the past ten years, Mr. Flaherty's practice has consisted almost exclusively of criminal cases in the district courts. He has practiced in many of the district courts in the Commonwealth and in the BMC. Since he ceased serving as Chairman of the Judiciary Committee, he has expanded the areas of his practice to include the Superior Court and civil cases. However, most of Mr. Flaherty's practice remains in the district courts. Of his district court cases, about 60% are in the BMC. OUI cases make up the predominant part of his case load.

Mr. Flaherty testified that his practice is to make the decision of whether or not to remove a Suffolk County District Court case to the BMC on a case-by-case basis. He testified that, often, before he is retained, his clients have decided to

claim a first instance jury trial to the BMC on their own. Factors that enter into the decision to remove a case to the BMC jury-of-six session are the fact situation involved and the judge likely to hear the case in the district court.

Mr. Flaherty testified that he had no special influence on the assignment of one of his cases to a particular judge in the BMC jury-of-six session. However, he testified that the Assignment Session of the BMC jury-of-six session operated in such a manner as to allow attorneys generally to exert some influence, if they so desire, upon the assignment of their cases to a particular session.

Mr. Flaherty testified that he knew Chief Justice Tierney before he became a judge. Mr. Flaherty first recalled meeting Chief Justice Tierney when the Chief Justice was working as a clerk in the BMC. Mr. Flaherty testified that he also encountered Chief Justice Tierney when the Chief Justice was working as a legislative liaison between the trial court and the Legislature. He testified that he did not know Chief Justice Tierney socially, and that they had no business relationship. Mr. Flaherty testified that he had no contact with Chief Justice Tierney about legislative matters since Chief Justice Tierney became a judge and that Chief Justice Tierney did not contact him regarding legislation giving the Chief Justice rule-making authority for the BMC.

Mr. Flaherty testified that he knew Judges Bakas, Hurley, Donovan and O'Toole before they became judges. He testified that

he met Judge Bakas when the judge was a clerk in Suffolk Superior Court and also knew him as a clerk-magistrate in Dedham. He testified that he met Judge Hurley when, as practicing lawyers, they served as co-counsel in a Superior Court criminal case and that he met Judge Donovan when the judge was working in the BMC Clerk's Office. He testified that he met Judge O'Toole through friends at the State House. Mr. Flaherty testified that he has not maintained social or business contact with any BMC judges following their appointment.

Mr. Flaherty testified that he has not had any meeting or contact with any present BMC judges regarding legislative matters.

Several of Mr. Flaherty's cases are discussed under separate heading in this report.[152] In addition to the cases separately discussed, other cases handled by Mr. Flaherty were reviewed during this inquiry and Mr. Flaherty was questioned concerning these cases. No evidence or indication of improper conduct by Mr. Flaherty was revealed during this inquiry.

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152 See Commonwealth v. Mook, Commonwealth v. Sheehan, Commonwealth v. McDonough, Commonwealth v. Joyce, and Commonwealth v. Grigaluans

VI.

SPECIFIC CASES REVIEWED

1. Introduction

As indicated in Section I. 2., the Globe series included anecdotal references to a number of cases heard in the Boston Municipal Court. These cases were alleged to be relevant to the various court-related issues about which the Globe reported.

As part of this administrative inquiry, those BMC cases which were discussed in the Globe series and which were deemed to fall within the scope of the inquiry were examined. These cases are summarized below. Included in the summary of each case is a determination as to whether any impropriety may have occurred. The determinations are based on examination of the court files and District Attorney's files; testimony of counsel, the judges involved, and in one case, members of the victim's family, witnesses and in two cases the defendants; review of the tape recordings of proceedings when available; and in some instances, analysis of the law involved in the particular case.

Certain of the cases which were mentioned in the Globe series are not summarized because on their face they did not raise any issues concerning, or were deemed to fall outside of the purview of, the Order of the Court setting forth the scope of this inquiry.

2. Commonwealth v. Esaul Evans
BMC Docket No. 88-4783

The Globe article of September 24, 1990 related the case of Esaul Evans, who, according to the article, claimed a trial de novo in the BMC after having been convicted in District Court on a drug offense. The article reported that the matter was dismissed in the BMC by Chief Justice Tierney when a police witness failed to appear in court; further, the article stated that the case file did not reflect that a summons to the officer had been sent.

The case papers in this case reveal that the defendant, who was charged with possession of a controlled substance with intent to distribute, was represented by a court-appointed lawyer and not by any of the six lawyers identified by the Globe as "politically-connected." The defendant was convicted in the Roxbury District Court and claimed trial de novo in the BMC, where he first appeared on August 4, 1988 at which time court-appointed counsel was assigned to him. The matter was continued to October 6, 1988, to January 3, 1989, and then to January 4, 1989,[153] when it was dismissed for want of prosecution by Chief Justice Tierney.

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153 The BMC docket and file erroneously read January 4, 1988.

The trial tape of the Evans case indicates that on January 3, 1989, the assistant district attorney requested that the matter be continued because she had been unable to communicate with one of three witnesses; defense counsel indicated that his witnesses were present and that he was ready. The matter was continued to the next day, at which time it was called for trial. The assistant district attorney reported to the court that the Commonwealth was not ready for trial because a necessary police witness was not present. The assistant district attorney stated that the witness had been reached by telephone during the previous evening and had indicated that she would be present for trial. The assistant district attorney specifically admitted that the Commonwealth had no reasonable excuse for the witness's non-appearance. The judge thereupon dismissed the matter for want of prosecution.

There is no impropriety in connection with this matter. As stated earlier in this report, dismissals for want of prosecution are not uncommon in the BMC, in particular because of police officers who do not appear. The fact that there was no police summons in the BMC file is not dispositive, since misfiling and errors in the subpoena process are not uncommon in the BMC.[154] In the Evans case, the judge continued the matter for one day to allow the Commonwealth to secure the presence of a necessary

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154 See Section II. 10 and 14 concerning notification to police of scheduled court appearances.

witness; on the following day, the assistant district attorney, although asking for a further continuance, admitted that there was no excuse for the non-appearance of the witness. Under the circumstances, it was well within the court's discretion to dismiss for want of prosecution.

3. Commonwealth v. Scott Delaney
BMC Docket Nos. 88-0347-88-0350

The Globe reported (September 4, 1990) that some judges used a motion to revise and revoke a sentence "to change a finding of guilty to not guilty, another apparent violation of the rules. In some cases, this was used to clean a person's record, even after he had served his sentence." The newspaper then illustrated its point with the case of Scott Delaney, which was heard by Judge Kelly in the BMC.

According to the Globe, Mr. Delaney was convicted of assault on May 17, 1988 by Judge Kelly and received probation for one year. After the probation ended, continued the Globe, Mr. Delaney appeared before Judge Kelly on October 4, 1989 and asked her to revoke the finding of guilty. The Globe commented that Judge Kelly thereupon "rewrote history" by changing the case file to reflect that the case had been continued without a finding. The Globe further reported that on October 6, 1989, the assault charge against the defendant was dismissed.

The docket in the Delaney case shows that on May 17, 1988 Judge Kelly accepted a plea of guilty from Delaney, who was then

found guilty. The May 17, 1988 hearing reveals that the charge arose out of an incident in which Delaney, who was 21 years old, was alleged to have been speeding and driving a motorcycle under the influence of liquor and almost struck three police officers. Delaney was severely injured when he lost control of his motorcycle. The Commonwealth recommended that a sentence of one year probation be imposed. After hearing a report from the probation officer that Delaney had no criminal record, Judge Kelly imposed a sentence of probation for one year until May 16, 1989 on the assault charge. On the complaints charging OUI and negligent operation of a motor vehicle, the judge found sufficient facts for a finding of guilty, and continued the matter without a finding for one year.[155]

Although there is some indication that the defendant and his attorney were contemplating returning to court after the probation was completed (apparently to seek some type of revision of the guilty finding with reference to the assault charge), nothing in the file or at the trial reveals any specific order or discussion with the judge or among the parties concerning revocation of the guilty finding after a year.[156]

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155 On the OUI charge, the defendant was assigned to an alcohol treatment program. There was also a speeding infraction for which the defendant was found responsible and a civil assessment imposed.

156 In her testimony, Judge Kelly stated that "counsel indicated he would file a motion to revise and revoke if I exceeded the Commonwealth's recommendation" and that she "later acted on that motion after hearing at which the Commonwealth was represented and indicated it

The BMC case file shows that a motion to revise and revoke the sentence in connection with the guilty finding on the assault charge was filed by the defendant on May 25, 1988 pursuant to Rule 29 of the Massachusetts Rules of Criminal Procedure. However, the motion was not brought forward for hearing until October 4, 1989, after the defendant had successfully completed probation.[157] The motion to revise and revoke requests that the

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(footnote, continued)
had no opposition to the course recommended by defense counsel." Judge Kelly's testimony was based on the erroneous belief that the Commonwealth had recommended that the matter be "continued without a finding," and that she had exceeded the Commonwealth's recommendation by entering a finding of guilty. In fact, Judge Kelly's finding and sentence were consistent with the recommendation of the Commonwealth.

Subsequent to her testimony, Judge Kelly submitted an affidavit dated January 18 [1991] in which she stated that at a lobby conference preceding the guilty plea, Mr. Delaney's attorney requested a continuance without a finding, and she rejected that request. In her affidavit, Judge Kelly stated that Mr. Delaney's attorney then asked whether "it would be acceptable for him to file a Motion to Revise and Revoke the sentence...." She stated that her recollection is that she agreed that she would revise and revoke the sentence if the defendant complied with the terms of probation and there were no additional criminal charges in order to "preserve Mr. Delaney's record and enhance his job prospects." She stated that her recollection is that the assistant district attorney did not object to the proposal. Judge Kelly's position is that she was legally compelled to allow the motion filed by Delaney because of this representation.

157 A letter dated September 29, 1989 from the probation officer supervising Delaney indicating his successful completion of probation appears in the BMC file.

"sentence" entered on May 17, 1988 "be revised to a dismissal of all counts." At the October 4, 1989 hearing, the Assistant District Attorney construed the motion as one seeking to have the guilty finding revoked, that a new disposition of continuance without a finding be entered (apparently for one year, nunc pro tunc to May 17, 1988), and that the matter then be dismissed. At one point during this inquiry, it had been suggested that the motion was treated as one under Rule 30, Mass.R.Crim.P., seeking post-conviction relief, although the case papers do not so indicate.

At the October 4, 1989 hearing in his argument in support of his motion, counsel for the defendant stressed the fact that his client was young, that this was his first offense (adult or juvenile), that the defendant himself was severely injured in the resulting accident, that the defendant was remorseful over the incident, that the defendant's family, who had been in the courtroom during the earlier plea hearing and had since moved out of state, was quite concerned about the incident, that the defendant had been employed over the past year, and that he now desired to join his family out-of-state but that his employment prospects were limited because of the conviction. The Commonwealth had no objection to the court allowing the defendant's motion,[158] and in fact the Assistant District

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158 The Assistant District Attorney characterized the events as "an aberration, a single-incident aberration."

Attorney noted that had the matter been continued without a finding initially as had been the other charges against Delaney, the assault charge would have been dismissed with them. The matter was taken under advisement, and on October 6, 1989, the guilty finding was revoked, the matter was continued without a finding to October 6, 1989 (apparently nunc pro tunc to May 17, 1988), and was dismissed on October 6, 1989.

There was no misconduct on the part of Judge Kelly in the handling of this case. Although Judge Kelly may have acted in the mistaken belief that she had the authority to allow the defendant's motion (and in a situation where the Commonwealth did not oppose the motion), there may have been error of law in the allowance of the defendant's motion.[159] This, however, does not amount to misconduct.

The Globe commented that Judge Kelly "rewrote history" by changing the case file to reflect that the matter had been continued without a finding. However, the case file accurately reflects what occurred in this case, namely a guilty finding and a subsequent revision of that disposition to continuance without a finding, although the practical effect of the revised sentence was to change the disposition originally given to the defendant.

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159 Because the original finding of guilty and sentence were not illegal, there appears to have been no basis for the judge to have acted under Rule 30 of the Mass.R. Crim.P. Also, the motion could not have been allowed under Rule 29 since the sentence had been completed.

4. Commonwealth v. Patrick G. Joyce
BMC Docket Nos. 87-1940 and 86-7351

The Globe reported on September 25, 1990 about the case of Patrick G. Joyce, who was alleged to have attacked two people on different days and was sentenced, in 1987, in West Roxbury District Court on one of the assault cases to nine months in jail. The Globe reported that Joyce claimed a trial de novo in the BMC, where he was represented by Attorney Michael F. Flaherty. The Globe indicated that the matter was heard by Judge Pino, who sentenced Joyce to six months in jail but delayed the start of the sentence for two months. According to the Globe story, Joyce was defaulted when he failed to appear, but almost two years later he returned to the BMC with Attorney Flaherty at which time Judge Pino "closed" the case after determining that Joyce had paid the victim's medical expenses.

The Globe further stated that there was a second assault case involving Mr. Joyce which was pending in the BMC. The paper suggested that this case was also resolved by Judge Pino in favor of Attorney Flaherty's client at the same time: "There was even that second case still kicking around. It, too, was wrapped up in the close-out deal, as Pino filed it without any penalty."

Attorney Flaherty testified that the Joyce case (Docket No. 87-1940) arose out of a barroom fight, in which Joyce himself was injured and another person received personal injury. The case was tried first in the West Roxbury District Court, where Joyce

was represented by another attorney. After receiving a sentence in the primary court which would have required him to serve nine months in jail, Joyce claimed a trial de novo in the BMC, at which time he was represented by Attorney Flaherty. Attorney Flaherty testified that all parties--including the assistant district attorney handling the matter at the BMC and the attorney for the victim of the assault--concurred that the primary court sentence was severe, especially in light of the fact that this was a first offense. Attorney Flaherty indicated that the attorney for the victim stated that the victim of the assault, who was the complainant, was not adverse to a disposition by which Joyce would avoid incarceration if he made restitution in the amount of the victim's losses, $4,000. Joyce agreed.

Joyce pleaded guilty on August 25, 1987 before Judge Pino (assault and battery by means of a dangerous weapon, blunt instrument) and was given the following sentence: one year in the House of Correction, with six months to be served and the balance suspended; probation to August 23, 1989; sentence stayed to October 9, 1987; $4,000 restitution.[160] Attorney Flaherty testified that the sentence meted out to his client was harsher than the one agreed upon by the parties, which did not include

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160 The docket incorrectly shows restitution in the amount of $400. Attorney Flaherty's testimony was that restitution was in the amount of $4,000.

any jail time.[161] Based on an examination of the docket and Attorney Flaherty's testimony, it appears that on August 25, 1987, at the time of the plea of guilty, the defendant was led to believe by Judge Pino that in the event he made restitution prior to October 9, 1987, Judge Pino would reconsider the imposition of the jail sentence to be served. According to Attorney Flaherty, the victim of Joyce's assault agreed to this course of action.

Attorney Flaherty testified that his client forwarded the first restitution check to him, which he deposited in his client's account for later disbursement to the victim. The check was returned for "insufficient funds." Attorney Flaherty was unsuccessful in attempting to locate his client, who "disappeared" for a substantial period of time, and on October 9, 1987, Joyce was defaulted. Subsequently, Attorney Flaherty learned that his client had joined the marines, but was discharged when they learned of the BMC matter. After Joyce's discharge from the Marines, Attorney Flaherty spoke with the defendant's mother, who informed him that her son was doing well and was attending a "program." In order to resolve the outstanding restitution order in the BMC, Joyce's mother borrowed $4,000, and the money was given to the victim of Joyce's assault.

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161 Attorney Flaherty attributed the harsher sentence in part to what he believed was Judge Pino's belief that the defendant may have had an alcohol problem.

On November 29, 1989, Joyce appeared in court, and the matter was sent to Judge Pino, who had entered the original orders in the case. Attorney Flaherty informed Judge Pino that restitution had been made and that the victim was satisfied. Judge Pino, exercising judicial discretion, thereupon revised the earlier jail sentence to one year in the House of Correction and probation to November 29, 1989.[162]

With regard to the second assault case involving Mr. Joyce (assault and battery by means of a dangerous weapon, shod foot, BMC docket No. 867351) and which the Globe stated was resolved at the same time as the one described above, Attorney Flaherty was not the attorney of record and never had involvement in the case.[163] In this second assault case, Mr. Joyce had been found indigent and was represented by a court-appointed attorney. Both assault cases against Mr. Joyce were brought forward on the same day (November 29, 1989), apparently in light of the fact that the defendant had been defaulted in both matters and because Mr.

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162 The BMC docket shows an entry dated November 29, 1989 indicating that restitution was made in full and probation terminated. This entry corroborates Attorney Flaherty's testimony that restitution had been made.

G.L. c. 276, §55, allows a judge before whom an assualt and battery complaint is pending to "discharge" a defendant where the victim has acknowledged receipt of satisfaction for the injury. The statute did not apply in this case.

163 Attorney Flaherty's name does not appear on the docket or case papers in this matter. Rather, the docket and case papers reflect the name of the court-appointed attorney who handled the matter.

Joyce was present in the courthouse. The second assault case in which Mr. Joyce was represented by appointed counsel was filed by Judge Pino on November 29, 1989. No tape recording could be found of the November 29, 1989 disposition of either the first or second assault case, thus frustrating the attempt to determine precisely what transpired in the courtroom. Why the second assault case was put on file by Judge Pino cannot be determined.

There was no impropriety other than Judge Pino's failure to have the proceedings recorded. Had the matters been recorded, a true account of what transpired would have been available to the Globe through the tape. In fact, Attorney Flaherty testified that he did not tell the Globe reporter who had contacted him about all of the details related above because he believed that the Globe had a tape recording of the proceeding. He further stated that he was going to try to locate the tape in order to prove that he conducted himself properly. Attorney Flaherty obviously would have been unable to do so.

5. Commonwealth v. James Forziati
BMC Docket Nos. 87-6677, 87-6678, 87-5370 and 87-5373

The Globe reported (September 26, 1990) about a matter in which an unnamed defendant, represented by Attorney Saggese, had been accused of stealing jewelry from the home of relatives in Lexington while they were attending a family wedding. The Globe stated that the police executed a search warrant at the

defendant's home in East Boston where they found some of the jewelry and illegal weapons. The Globe reported that the burglary matter was resolved by a plea in Middlesex Superior Court; with regard to the weapons matter, the defendant moved the case from the East Boston District Court to the Boston Municipal Court by claiming a first instance jury trial.

The Globe reported the following concerning the BMC case. Attorney Saggese filed a "thick" motion to suppress in the BMC, where it was heard by Judge Pino. Judge Pino "chewed out" Attorney Saggese because he did not argue that the search was invalid on the basis that no police officer had signed the warrant, thus making it, in Judge Pino's opinion, invalid. There was no prosecutor present in the courtroom to object, and Judge Pino announced that the prosecutor (Ms. Orfanello) should be told that he allowed the motion to suppress. The Globe further reported that when confronted later, Ms. Orfanello indicated that she agreed with Judge Pino's ruling, and when told that the case of Commonwealth v. Young[164] held that the lack of a signature is not fatal, she responded: "Oh."

The case was identified and investigated during this inquiry. The BMC docket indicates that the motion to suppress was taken under advisement on October 19, 1988 and the motion was

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164 Apparently the reference is to the Appeals Court case of Commonwealth v. Young, 6 Mass.App.Ct. 953 (1978).

allowed on November 3, 1988 and the matter was dismissed. In his testimony, as part of this inquiry, Attorney Saggese stated that he believed that after the motion to suppress was argued, he was called back to court a few weeks later at which time Judge Pino announced his decision in the case. Attorney Saggese testified that he believed that an assistant district attorney was present in the courtroom at the time of the judge's ruling, although he could not remember who it was. Mary Orfanello, the Assistant District Attorney who, according to the Globe responded "Oh" when told by the Globe of the case of Commonwealth v. Young, testified that she was not in the courtroom at the time Judge Pino ruled on the motion, and she did not know which Assistant District Attorney, if any, was present.[165]

The motion to suppress filed by Attorney Saggese was supported by a 20-page memorandum of law which dealt with the specific facts of the Forziati case and closely examined the affidavit submitted in support of the search warrant and the return of service. It analyzed the facts of the case with reference to applicable Fourth Amendment law. A tape recording of the proceeding on November 3, 1988 was located, and it appears from the recording that Mr. Saggese was in the courtroom on not

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165 The District Attorney's file in this case indicates that another assistant district attorney was present for Ms. Orfanello November 3, 1988, the date on which the motion to suppress was allowed, and the case was dismissed.

only the Forziati case, but also on other matters. The quality of the recording is poor, but it does appear that there was an assistant district attorney in the courtroom at the time. Judge Pino is heard to state to Attorney Saggese that he must read the application and affidavit; that the person who signed the warrant did not sign the application or affidavit; that "it's a nothing."

There was no misconduct in this case either by Judge Pino or Attorney Saggese. Attorney Saggese filed a lengthy motion to suppress which discussed the facts of the case and the applicable law. He testified in this inquiry that in his opinion, there were many more reasons why the motion should have been allowed, other than what may have been the incorrect reason given by Judge Pino. In any case, the Commonwealth did not claim an appeal from the allowance of the motion to suppress.[166] Even though Judge Pino's stated reason for the allowance of the motion may have been in error, that by itself does not constitute misconduct. There was no other independent evidence of misconduct.[167]

6. Commonwealth v. George V. Kenneally, III
BMC Docket No. 87-6907

The Globe reported (September 26, 1990) about the case of George V. Kenneally III, a court officer who was charged with OUI

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166 See Mass.R.Crim.P. 15(b); G.L. c. 278, §28E.

167 No opinion is rendered herein as to whether the motion to suppress should have been allowed for any of the reasons set forth in Attorney Saggese's motion.

late in 1987. George V. Kenneally III is the son of George V. Kenneally, Jr., one of the six lawyers who are identified in the Globe series.[168] The article stated that the defendant's father, who represented his son in this case, moved the case to the BMC, where it was dismissed by Judge Pino on March 1, 1988 because a police officer did not appear. The Globe indicated that the arresting officer was unable to appear because he was at a police training academy. According to the Globe story, the officer's superior told the Globe that the court was notified that the officer was unavailable, yet would not continue the case.

The series of events leading to the dismissal in the Kenneally case and the hearing at which the dismissal occurred are described below in detail. The investigation conducted during this inquiry revealed that the Globe had attempted to obtain a tape recording of the March 1, 1988 dismissal in the Kenneally case, but no tape recording could be found by the BMC tape librarian. Early in this investigation, the Special Master also requested that a search be made for the tape of the March 1, 1988 hearing, and the BMC tape librarian reported that it could not be found.[169] However, as will be seen below, a tape did

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168 See Section V. 1 concerning George V. Kenneally, Jr.

169 This request was made prior to the taking of Judge Pino's testimony. Hence, the Special Master was unaware at the time of Judge Pino's testimony that a tape recording in fact existed and that it showed that the assistant district attorney informed Judge Pino

exist and has been examined as part of this inquiry.

The BMC docket in the Kenneally case shows that the matter originated in the West Roxbury District Court where a first instance jury trial was claimed, thus bringing the matter to the jury-of-six session of the BMC. The papers in the case indicate that Mr. Kenneally had been arrested by the MDC Police for OUI. The defendant first appeared in the BMC on January 12, 1988, at which time he pleaded not guilty before Judge Pino and the matter was continued to January 26, for "[s]tatus only."

When asked the meaning of the term "status" during her testimony, Mary Orfanello, the assistant district attorney who handled this case, responded that "[i]t can mean anything;" she further stated the term may refer to various pre-trial matters which may require the court's attention, such as motions, discovery, setting a date for hearing, or the determination of the status of witnesses.

On January 26, 1988, Judge Pino continued the case to February 16, 1988, once again for "status only."[170] The

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(footnote, continued)
that the police officer was unable to be present because he was in the academy. No suggestion is made here that any of the BMC personnel acted improperly in not having found the tape recording originally. The tape librarians may have been looking for an actual trial.

170 Judge Pino was unclear in his testimony as to the circumstances in which witnesses were to be present for status.

district attorney's file reflects that on January 26, 1988 Attorney Kenneally was in the hospital and that the matter was continued to February 16, 1988 and consistent with the docket entry of "status only," states "no wits necess." The BMC docket reflects that on February 16, 1988 the matter was continued once again by Judge Pino to March 1 for "status," with a notation to the effect that police officers were to be summoned. A notation in the district attorney's file for February 16, 1988 reflects the continuance to March 1, 1988 and the comment "notify wits."

In his testimony, Judge Pino stated that on February 16, he had to continue the matter because the police were not present and that he recalled that he specifically had "asked for the police to be here" on February 16. Judge Pino's recollection that he had requested the police to be present on February 16 is incorrect. There is nothing in the docket or BMC file indicating that he had requested the police to be present on February 16, a day on which the matter had not been set for trial. It is also contrary to the notation in the District Attorney's file that no witnesses were necessary. Judge Pino's testimony that he wanted witnesses to be present on February 16 should also be taken against the background that on January 26, Attorney Kenneally was not present but in the hospital. The tape recording of the February 16 hearing before Judge Pino was obtained and examined. It has been transcribed and is attached hereto as Appendix F. The recording confirms that police had not been required to

appear on that date. The tape reflects that Judge Pino first asked Attorney Kenneally how he was (since he had earlier been in the hospital). At some point, the tape machine is heard to click off. After the tape machine is turned on, Judge Pino stated that the matters would be put over for two weeks until March 1 for "status," and that he wanted the police officers to be summoned for the March 1 status date. After the clerk announced that the matter was continued until March 1 for status and that the officers were to be summoned, Judge Pino stated "Let's see if they show up." After some "small talk," the matter was then concluded.

On March 1, 1988, the Kenneally case was dismissed by Judge Pino for want of prosecution. The BMC docket includes the following explanation for the March 1, 1988 dismissal: "No Police Officer."

At her deposition, the assistant district attorney who handled the Kenneally case, Mary Orfanello, examined the district attorney's file and stated that although she had no recollection of the case, the file indicated that she informed Judge Pino that the police officer was unavailable because he was at the police academy.[171] The district attorney's file in the case confirms

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171 Ms. Orfanello testified that the district attorney's "file indicates that we received a message that he [the police officer] was in the police academy and that we related [sic] that message to the court but the matter was dismissed."

that this information was communicated to Judge Pino on the day of the hearing.[172]

In his testimony during this inquiry, Judge Pino denied that he was told on March 1, 1988 that the police officer was in the academy, and stated that had he been told, he would have continued the case.[173]

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172 The district attorney's file reflects a dismissal on March 1, 1988 by Judge Pino and contains the further notation "PO not here got mess. he's in Academy- relayed to ct."

173 Judge Pino's sworn testimony on this issue was as follows:

Q. Did you get a message that the police officer was in the academy?
A. Absolutely not.
Q. If you had, what would you have done?
A. I probably would have continued it.
Q. Were you told on March 1, 1988, that the police officer was in the academy?
A. I would say, no, I was not told.
Q. Had you been told, you would have continued it?
A. Certainly, I would have because--....
Q. Turn to the front of the [District Attorney's] file, Judge. The next sheet. Look at the district attorney's file and look at the last entry time [sic] it was dismissed.
A. Well, I'm sorry.
Q. What does it say?
A. "Relayed to the court and disposed". [sic] [Judge Pino was reading the portion of the District Attorney's file indicating that the case was disposed.]
Q. Excuse me?
A. "PO note here. Got message he's in the academy. Relayed to the court and disposed." I take issue with that because I would have continued it if I had valid reason, Dean.
Q. Once again, the best way to determine that would be with the tape, wouldn't it?
A. Yes. No question about it.
Q. There's no tape of this case?
A. As I said earlier, the tape, if I left it

Subsequent to Judge Pino's deposition, a decision was made to listen to the entire day's tape for March 1, 1988 for the courtroom in which Judge Pino had been sitting on the chance that the tape may have been overlooked previously. It was through this method that the tape of the Kenneally hearing was in fact located. The tape recording of the March 1, 1988 hearing before Judge Pino has been listened to and transcribed. A copy of the transcribed recording is included in this report as Appendix G.

The tape recording confirms that Judge Pino had in fact been notified of the reason for the officer's absence. The recording indicates that after the Kenneally case was called, the assistant clerk stated to the judge that the police officer was to be summoned in. Assistant District Attorney Mary Orfanello then stated that she had notified MDC Police Officer White (the officer in question) and that she had received a message that morning that Officer White was in the academy and will not be in court.[174] Judge Pino then stated to the Assistant District Attorney that this was the third time that the matter had been on

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(footnote, continued)
alone, would be my best friend.
Q. The tape was not on because you had ordered it not to be?
A. If I'm not mistaken, this took place in 371. I never touch the machine on the call of the list in 371.

174 It has been determined during this inquiry that Officer White was in fact at the academy on March 1.

for trial and that he was "sorry" and was going to dismiss the matter for want of prosecution. Judge Pino's statement that that was the third time the case was on for trial is not correct.[175]

After the dismissal for want of prosecution in the BMC, Officer White of the Metropolitan Police sought a new complaint in the West Roxbury District Court against Mr. Kenneally. A hearing on the issuance of process on the new complaint was held before Judge Tracy in the West Roxbury District Court (apparently the clerk did not act on the complaint because Mr. Kenneally was a court officer in the West Roxbury District Court) on June 14, 1988, at which time Mr. Kenneally was represented by different counsel. A number of arguments was presented by defense counsel against the issuance of process,[176] including a claim of improper venue,[177] that the Commonwealth should have claimed an appeal

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175 There were three dates on which the Kenneally cases was called in (excluding the first appearance date of January 12, 1988): January 26, February 16, and March 1. Judge Pino testified that the case could not go forward on January 26 because Attorney Kenneally was in the hospital, and in any case, witnesses had not been required to appear on that date. On February 16, the case was only on for status and no witnesses were necessary. On March 1, even though police officers were subpoenaed for some reason, the case was only on for status.

176 Apparently, the district attorney's office did not handle the matter at the time of the request for process on the new complaint, and the matter was handled at the West Roxbury Court by a police officer.

177 The incident occurred near the territorial border between the area of the West Roxbury District Court and the Dorchester District Court.

from the BMC dismissal, and that the Commonwealth could, if it chose, indict the defendant. The judge refused to issue process on the new complaint, and the matter ended at that point.

It is clear Judge Pino was aware on March 1, 1988 of the reason for the absence of the police officer. In light of the testimony of Judge Pino that he would not have dismissed the case had he known of the reason for the officer's absence, the fact that the matter had not been on for trial on a previous date, his action on February 16 in turning the tape off and his comment on that date "Let's see if they show up," and the fact that on the day of dismissal, the case was on for "status," a finding is made here that Judge Pino's actions in this case were improper.

7. Commonwealth v. John A. Fagone
BMC Docket Nos. 87-2565, 87-2466 and 87-3951-56

The Globe (September 26, 1990) referred to an unnamed defendant who had been represented by Attorney Michael LoPresti[178] in connection with various charges pending in both Suffolk Superior Court and the BMC. The Globe indicated that this case illustrated "the slack the Boston court had cut LoPresti, leeway that a court in another county would not provide." According to the Globe, the Superior Court cases involved selling of drugs emanating from incidents in 1986 and 1987; the BMC cases involved possession of drugs and assault

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178 See Section V. 3 concerning Michael LoPresti.

emanating from separate incidents, also in 1987. In addition, a separate assault case was brought against the defendant in a district court in Middlesex County (Malden District Court). The Globe also stated that the defendant was originally represented by another attorney, whom he dropped, apparently because he was not satisfied with a "bargain" his attorney was able to obtain which would have required him to serve one year in jail. The Globe stated that the defendant was able to do better by hiring LoPresti, who "managed to negotiate plea bargains for which his client spent 11 months in prison."

The Globe explained the dispositions as follows. The prison time resulted from settlement of the Superior Court matters, where the defendant received six to 14 years in prison, but only 14 months were to be served (and the defendant was out of prison after 11 months). On the same day as the Superior Court matters were settled, the defendant pleaded guilty to the BMC matters before Judge Pino and the cases were "filed,"[179] thereby avoiding any penalty for the defendant in connection with the BMC matters. The Globe described the BMC resolution as "an outcome

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179 See G.L. c. 218, §38. Filing of a case is not a final disposition, but suspends the proceedings. A criminal matter may be filed after a finding of guilty where the public interest does not require an immediate sentence. However, the matter may be brought forward at a later time for sentencing. Commonwealth v. Bianco, 390 Mass. 254 (1983); Commonwealth v. Dowdican's Bail, 115 Mass. 133 (1874); Marks v. Wentworth, 199 Mass. 44 (1908). Although the case may be brought forward, filing usually ends the matter.

illustrating the lightness of being at Boston Municipal Court." The newspaper also stated that court officials were unable to locate a tape recording of this case which had been requested by the Globe. Various unnamed law enforcement officials contacted by the Globe reportedly commented that filing of the cases was "too soft, a kind of legal disappearing act that treats the crime as if it never happened...tantamount to saying you get a free pass."

The Globe story then compared the BMC result with the disposition which Attorney LoPresti was able to obtain for his client in the Middlesex case in Malden District Court. In return for his guilty plea there, the defendant received probation for three years and a suspended two-year jail sentence. The paper concluded: "For the seven assault and drug possession cases in Boston Municipal Court, the pusher got nothing. But for the single assault case in Malden, he faces two more years in jail if he gets in trouble again between now and September 1991."

Testimony on this case was taken both from Attorney LoPresti and the Assistant District Attorney who handled the matter in the Superior Court, Attorney Matthew King.[180]

The handling of these cases in the BMC was not improper and, according to testimony, was consistent with accepted practice in the criminal courts. The BMC cases were brought forward on the

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180 Attorney King left the District Attorney's office in 1990 and is now in private practice.

same day on which the Superior Court matters were resolved in order to conclude all matters against the defendant prior to his incarceration. Attorney King testified: "It's not entirely unusual for an attorney to attempt to wrap all cases up at the same time, especially if someone is going to be incarcerated, to avoid the sometimes aggravation and cost of transporting someone from a facility back to the court. If he's physically present, you might do as much as you can on that day."

The filing of the matters against this defendant in the BMC did not amount to improper conduct. Attorney LoPresti testified that the BMC matters were filed with the concurrence of the District Attorney's office.[181] Attorney King testified that in light of the fact that the defendant had received a committed state prison sentence from a different judge in the Superior Court, it would not have been unusual for pending lesser complaints in the BMC to be filed[182] after entry of a finding of

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181 The District Attorney's file does not indicate who the assistant was who handled the matters in the BMC on the date of disposition. Although Attorney LoPresti at first testified that Mr. King handled the BMC matters as well as the Superior Court matters, he corrected himself a few moments later and acknowledged that Mr. King handled only the Superior Court cases and that he could not recall who handled the matters in the BMC for the District Attorney's office. Mr. King testified that he was assigned to the Superior Court at the time and would not have gone down to the BMC to handle the matters pending there.

182 It should also be noted that the Globe's comment that the BMC disposition of filing served to terminate the cases is not technically correct. Rather, filing only suspended further proceedings. Although perhaps not likely, the Commonwealth could reactivate the filed

guilty. Attorney King further stated that in light of the fact that the BMC could only have sentenced the defendant to Deer Island, the state prison sentence meted out in the Superior Court matter would have taken precedence over any BMC sentence in any case.[183] He concluded that the BMC disposition was not "unusual" and that the matters were handled "properly."

The actual disposition in this case does not present any impropriety. Once again, the improper conduct of Judge Pino in having failed to record the case has resulted in the Globe's having been unable to review the court proceeding in order to determine what actually occurred. The events, as reconstructed, do not indicate improper conduct, but the failure to record does.

8. Commonwealth v. Harry G. Mook
BMC Docket No. 86-4686

The Globe articles reported (September 25, 1990) about the motor vehicle homicide case against Harry G. Mook, described by the Globe as a "restaurateur and convicted tax cheat who was

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(footnote, continued)
cases in the future by moving for sentencing. Commonwealth v. Brandano, 359 Mass. 332 (1971).

183 Attorney King testified: "As you know, the Boston Municipal Court can only sentence a person to Deer Island at its maximum, and a state prison sentence takes precedence. You can't give a concurrent to Deer Island. Since he's already commenced serving his sentence at Walple, he would stay at Walpole. And when his parole eligibility date came up, and assuming he was eligible, he would be released and placed under the supervision of a state parole board rather than the county or the Boston Municipal Probation Department."

charged last month with operating a multimillion-dollar money laundering ring" with "subterranean contacts all over the city." The article stated that the Cadillac which Mook was driving struck and killed James P. Foundas in Brighton, a "Greek immigrant in his 90s who had once sold fruit and vegetables from a horse-drawn cart. Among his Brookline customers had been the Joseph P. Kennedy family." Mook hired Attorney Michael F. Flaherty, according to the paper, who moved the case from the primary court in Brighton to the BMC jury-of-six session, where the case "languished." The Globe indicated that unlike what occurred in most other cases, the victim's relatives in the Mook case, Pamela and Karen Pappas, attempted--unsuccessfully--"to ensure justice was done."

The Globe recounted the efforts of Pamela Pappas to ascertain why the case had been so slow in coming to trial and reported that she met the prosecutor in the case, Stephen Foley, in his office, who "launched into a frank account of how the game is played at the Boston court." The newspaper then related the following:

> The prosecutor, recalled Pappas, described Flaherty's high rank on the Legislature's Judiciary Committee and said that the lawmaker wielded extra influence with judges. He said Flaherty had probably moved the case out of the dead man's neighborhood court because he had more

clout downtown. And Pappas recalled Foley voicing one more concern: that it would not serve his own career as an up-and-comer to tangle too roughly with Flaherty.

According to the Globe, Ms. Pappas kept a diary in which she recorded her frustrations as she attempted to have the case brought to trial. Mook had replaced Flaherty with a new attorney. When the matter was finally called for trial, Assistant District Attorney Foley told the court that he could get only one police expert to appear and no other witnesses would appear, and the matter was dismissed for want of prosecution.

The newspaper also reported that when the Globe reporter interviewed Attorney Flaherty about the Mook case, he "at first denied ever representing Mook at all, then conceded he was his attorney until he dropped out of the case."

The court papers revealed that a charge of motor vehicle homicide by negligent operation was brought against Mr. Mook in the Brighton District Court arising out of the incident in which Mook's vehicle struck and killed James Foundas on September 25, 1985.

Attorney Flaherty testified that he represented Mr. Mook at the Brighton District Court, at the defendant's initial appearance at the BMC, and perhaps at a few subsequent times when the case was called, including a conference. Attorney Flaherty stated that he was discharged as Mook's attorney and that Mook

had retained new counsel, Attorney Henry Wynn, to represent him, and that he so informed the court on December 2, 1986.[184] Attorney Flaherty spoke to Attorney Wynn once about the case and forwarded the file to him.

The BMC file shows that a first instance jury trial was claimed in the Brighton District Court to the BMC, and that the primary court scheduled the defendant's first appearance in the BMC for August 8, 1986. After the defendant's initial appearance on August 8, 1986, the case was continued to September 19, 1986, December 2, 1986, January 30, 1987, [185] April 8, 1987, May 5,

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184 The BMC file contains a letter dated December 2, 1986 from Attorney Flaherty to Judge Pino stating that on the previous day he had appeared before Judge Pino in the Mook matter and requested a continuance until January 30, 1987 and that the request was with the agreement of Assistant District Attorney Stephen Foley; that Attorney Flaherty had spoken with his client and had just learned that his client intended to change lawyers, with Mr. Flaherty's "consent and recommendation;" and that he was requesting permission to withdraw.

185 The BMC file contains an appearance slip for Attorney Henry B. Wynn which was filed on January 27, 1987. However, the file also contains a letter date-stamped by the clerk's office either December 30 or 31, 1986 (the stamp is unclear) in which Attorney Wynn stated that he was appearing on behalf of Mook and requested a continuance from the January 30 date because of scheduling conflicts. On January 27, 1987, Judge Pino allowed a written motion by the defendant to continue the case from January 30, 1987 (the motion erroneously states that the matter had been set for January 29), and the motion shows that Assistant District Attorney Stephen M. Foley assented to the continuance. Judge Pino continued the case to April 8, 1987, and the docket contains the notation "both parties must be ready for trial sanctions will be imposed to both counsels [sic]." The file also contains a copy of a letter dated January 27, 1987 from

1987, and finally to May 6, 1987. On May 6, 1987, the case was dismissed by Judge O'Toole for want of prosecution.

Interviews were conducted with Dr. Pamela Pappas and Dr. Karen Pappas,[186] relatives of the victim in the Mook case who had been reported by the Globe to have been angry and frustrated as to how the case was handled as it went through the criminal justice system. In addition, sworn testimony was taken of Dr. Pamela Pappas. Dr. Pappas testified that the victim was the brother of her grandfather. Dr. Pappas indicated that she was at the scene of the incident soon after Mr. Foundas had been struck by the vehicle which Mook was driving on September 25, 1985, and that she observed Mook at the scene and saw the location and condition of his vehicle and the police. Mr. Foundas died from the injuries within a short time after the incident. She stated that she and her sister wanted to be sure that Mook was brought to justice, and that therefore, she was vigilant in watching the case as it moved toward trial. She also made extensive notes of

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(footnote, continued)
Linda M. Scanlon, Deputy Assistant Clerk, addressed to Attorney Wynn stating: "Please be advised that Judge John A. Pino has instructed that you be notified that either failure to appear on April 8; or to be ready for trial in the above-entitled matter will result in the issuance of sanctions against counsel for the defense [sic]."

186 Pamela Pappas and Karen Pappas, both dentists, are sisters.

her dealings with various persons in the court process, and these notes have been marked as exhibits in this proceeding.

Dr. Pappas testified that her first contact with the Suffolk County District Attorney's office occurred on November 17, 1986, when she had a telephone conversation with the prosecutor, Stephen Foley. On November 19, 1986, Dr. Pappas met with Mr. Foley at his office. She testified that at this meeting, Assistant District Attorney Foley told her that he was "not too optimistic, and that the system works against us because of [Attorney] Flaherty's influence."

Dr. Pappas testified that she appeared at the BMC on May 5, 1987, when the matter was set for trial. She testified that the case was called in Room 371, that District Attorney Foley told the judge that no witnesses had arrived, and that she spoke out and stated that she was present in order to get Foley's attention. The case was then assigned for jury trial in Room 371. Dr. Pappas, who was not in the courtroom at the time, stated that Mr. Foley informed her that Judge O'Toole had continued the matter to the next day, May 6, 1987, but that her schedule did not allow her to be present on May 6. Her notes indicate that Mr. Foley stated that various witnesses who had been subpoenaed were not present, and the judge was "demanding facts." Dr. Pappas was not present on May 6, 1987 because of her dental office appointments, when the matter was dismissed for want or prosecution.

At his deposition, Mr. Foley denied making the statements which Dr. Pappas attributed to him with regard to the influence which Mr. Flaherty may have had in the court system.

Attorney Flaherty testified that during a telephone conversation with his client, he was informed that his client had discharged him and obtained new counsel, Henry Wynn, who handled the matter from that point.

The tape recording of the May 6, 1987 court hearing revealed that Assistant District Attorney Foley vigorously argued that Dr. Pappas wanted to be present for the trial, that she had a right to be present, that she had been in court on all previous occasions, and that she was unable to be in court on May 6, 1987 because of her schedule as a dentist. Hence, he was requesting a continuance. Judge O'Toole stated that he understood, but that the BMC was a busy court, and that he could not schedule proceedings for people who were not "direct participants" in the trial. The judge denied the request for continuance and asked whether the parties were ready to go forward. The Commonwealth responded that it would not move for trial. The attorney for the defendant requested that the case be dismissed with prejudice so that the Commonwealth would not be able to seek a new complaint. The case was thereupon dismissed for want of prosecution.[187]

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187 The District Attorney's file contains the following notation by Assistant District Attorney Foley: "Judge O'Toole informed victim's family i.e. Dr. Pappas unable to be here but insisted on being here. Judge refused Commonwealth's first & only Request for Continuance."

There is no evidence of improper conduct on the part of Attorney Flaherty or any other party in this case. Attorney Flaherty ceased representing Mr. Mook approximately six months before the case was called for trial and did not represent the defendant on the day the matter was finally disposed in the BMC.

Even if the statements concerning the influence of Mr. Flaherty were made by Mr. Foley to Dr. Pappas (which Mr. Foley denied having made), Mr. Flaherty had no influence on the outcome of the case because he no longer represented Mr. Mook at the time of disposition.

Although some other judge may have acted differently under these circumstances in light of the fact that the Commonwealth was making its first and only request for continuance, it was well within the judge's discretion to deny the continuance.

9. Commonwealth v. Andrew Cahill
BMC Docket No. 89-7014-15

Commonwealth v. Joseph Porter
BMC Docket No. 89-7016-17

Commonwealth vs. Jason Shea
BMC Docket No. 89-7018-19

On September 24, 1990, the Globe reported on a case of three men arrested in Revere and charged with possession of cocaine and a stolen firearm. The Globe reported that the men were convicted

in the Chelsea District Court and appealed to the BMC. The BMC trial was jury-waived before judge Pino who, according to the Globe, found the three men not guilty in the middle of the arresting officer's testimony.

The administrative inquiry identified the case referred to as Commonwealth v. Andrew Cahill, Joseph Porter and Jason Shea. Each of the defendants was charged with possession of a Class B substance and carrying a firearm without a license. None of the defendants were represented in the BMC by any of the six lawyers identified in the Globe series. Two of the defendants had court-appointed counsel and one had privately-retained counsel.

The first appearance in the BMC was on November 13, 1989. On February 7, 1990, Judge Meagher held a hearing on a Motion to Suppress filed on behalf of Jason Shea and joined by the other defendants. He denied the Motion on March 5, 1990. The tape of this hearing was available and reviewed.

On May 3, 1990, Judge Pino held a jury-waived trial in which each of the defendants was found not guilty.

This administrative inquiry searched for and could not locate a tape recording of the proceedings. As discussed in the section of the report devoted to Judge Pino, the failure to tape this, among other proceedings, constitutes improper conduct. Because of Judge Pino's improper failure to record the proceeding, the inability to determine the cause for the disposition creates the appearance of impropriety. No conclusion

can be drawn concerning the propriety of Judge Pino's conduct of the trial because of the failure to record the proceedings.

10. Commonwealth v. Finbar Collins
BMC Docket No. 89-4981

On September 24, 1990, the Globe reported that Finbar Collins had waived his right to a jury trial of an OUI charge, and Judge Hurley found sufficient facts for a finding of guilty and sentenced Mr. Collins to an alcohol treatment program. The Globe reported that thereafter, Mr. Collins' attorney, John Galvin, sent a two-paragraph letter that caused Judge Hurley to grant a new trial. The Globe commented that an "affidavit ... offering new evidence" is required for the grant of a new trial. The Globe quoted an unidentified "expert on district court rules" as stating that Attorney Galvin's request was a motion "to gimme a break."

An examination of the BMC court papers and district attorney's file indicates that Mr. Collins was arrested on July 16, 1989 and charged with OUI in the Dorchester District Court. There was an additional civil infraction, speeding. Mr. Collins claimed a first instance jury trial in the BMC. He retained Attorney John M. Galvin to represent him. The case was scheduled for trial on March 1, 1990, at which time Mr. Collins filed a jury waiver, and Judge Hurley found facts sufficient for a finding of guilty and entered the following disposition:

> 24D Disposition/Part A-CFFS $500 to Feb. 27, 1991 own recog./ASAP Program/45 Day Loss of

> License 3/1/90 to 4/15/90/Part B-Responsible/
> $20 Assessment.

On March 14, 1990, Mr. Galvin filed a Motion for Reconsideration stating the following:

> Now comes the defendant in the above-entitled matter and respectfully moves this Honorable Court to reconsider the finding entered on March 1, 1990 or in the alternative to grant the defendant's motion for a new trial.
>
> In Support Thereof, the defendant states and in the interest of justice the foregoing motion should be allowed.

Judge Hurley allowed the Motion on March 19, 1990 and ordered the case to be rescheduled for trial.

Attorney Galvin testified during this investigation that on March 1, 1990, he and Mr. Collins appeared at the BMC for trial, and the case was sent to Judge Hurley. Judge Hurley conferenced the case, out of the courtroom, with the assistant district attorney and Mr. Galvin present. After the conference on the Collins case, other cases were conferenced. Mr. Galvin testified that during the conference, he told Judge Hurley, in response to a question about whether Mr. Collins was interested in the "program," that Mr. Collins wanted a trial of his case. Mr. Galvin testified that when Judge Hurley finished conferencing cases, he entered the courtroom and began hearings on those cases. The trial tape discloses that when the Collins case was reached, Judge Hurley asked the police officer to take the stand. The police officer recited his observations concerning the case; then Judge Hurley announced the sentence as set forth above.

Mr. Galvin testified, and review of the tape confirms, that there was no questioning of the police officer, either on direct or cross-examination, that there was no evidence presented by the defendant, and that the short proceedings were followed immediately by the next case. Mr. Galvin testified that the matter was to have been a trial, that he felt that Judge Hurley had made a mistake, and that he was surprised by the events. Apparently, Judge Hurley mistakenly treated the case as an admission, confusing it with other cases he had conferenced. Mr. Galvin testified that when Judge Hurley took a recess (after hearing other cases), he approached the Clerk of the session indicating that a mistake had been made, that Mr. Collins had wanted a trial, and that it was not an admission. The Clerk left to give the message to Judge Hurley and returned telling Mr. Galvin that Judge Hurley suggested that he file a motion. Mr. Galvin testified that he filed the motion set forth above. The motion was heard and allowed by Judge Hurley after a brief hearing. Both Mr. Galvin and an assistant district attorney were present. Mr. Galvin testified that following Judge Hurley's allowance of the motion, the case was subsequently tried before Judge Johnson and a jury. Mr. Collins testified at his trial, and the jury returned a verdict of not guilty. The BMC docket confirms a jury trial was conducted by Judge Johnson on May 16 and 17 of 1990, ending in a verdict of not guilty.

Rule 30(b), Mass. R. Crim. P., governs motions for new trial. (Although the above motion was called a Motion to

Reconsider, it also requested a new trial.) The Reporter's Notes to the rule indicate that the rule covers both motions based on newly-discovered evidence and motions based upon events relating to the conduct of the trial. Rule 30(c)(3) governs affidavits and requires affidavits "... where appropriate." Although Judge Hurley may have denied the motion on the grounds that no affidavit was filed and although the optimum practice would have been to have such an affidavit, there was no absolute requirement that an affidavit be submitted.

The conclusion to be drawn from the foregoing description of the proceedings in the Collins case is that there was no impropriety on the part of Judge Hurley or any other person.

11. Commonwealth v. Katherine Stacy

BMC Docket Nos. 88-6842-47

Katherine Stacy was arrested on September 5, 1988 in Winthrop. She was charged with being a disorderly person, destruction of property, operating after license revocation, a seat belt violation, failing to stop for a police officer and OUI second offense. The complaint application describes the incident in part: "While attempting to identify operator for M/V violations the female operator grabbed and pulled at my uniform shirt tearing same around the button area. During this time, she was shouting obscenities, throwing her hands in the air running around the M/V. These actions caused a crowd to form...."

On September 25, 1990, the Globe series reported that Ms. Stacy retained Attorney Salvatore DiMasi and that Mr. DiMasi on multiple occasions continued the case. The Globe reported that on each occasion, the arresting officer, Sergeant Frank Scarpa, was present. The Globe report indicated that the first occasion Sergeant Scarpa was not present was November 10, 1989, at which time the prosecutor and one of Mr. DiMasi's associates "cut a deal" for Ms. Stacy. The Globe reported that Sergeant Scarpa was told not to come on November 10, 1989; that on the police calendar, that date was marked "for status only"; that he would not have agreed to the disposition; and that Sergeant Scarpa felt "set up" by the disposition of the Stacy case. Upon being told that court records indicated a trial was held, Sergeant Scarpa was reported to have commented "How could they have a trial without the arresting officer?"

An examination of the court papers shows that in the East Boston District Court, Ms. Stacy claimed a first-instance jury trial in the BMC. The cases were transferred to the BMC jury-of-six session. Ms. Stacy's first appearance date in the BMC was November 8, 1988. She appeared without an attorney, and the matter was continued to November 22, 1988 for her to obtain an attorney. On November 22, 1988, she appeared with an attorney, other than Mr. DiMasi. The case was continued to March 16, 1989 for trial when Ms. Stacy was again present with the same attorney. On March 16, 1989, the case was continued to May 23,

1989 when Attorney Salvatore DiMasi appeared for the first time for Ms. Stacy. The case was assigned for trial on July 27, 1989. On that date, both Ms. Stacy and Mr. DiMasi were in court. According to the District Attorney's file, the arresting police officer was in "East Boston" on that date, and the Commonwealth requested and received a continuance to October 18, 1989. On that date, all parties were in court, the matter was not reached, and the case was continued to November 10, 1989.

On October 23, 1989, Mr. DiMasi suffered a heart attack and was unable to resume practice until January 1990. Attorney Steven Topazio[188] handled the Stacy case during Mr. DiMasi's absence. On November 10, 1989, Ms. Stacy, Mr. Topazio and the assistant district attorney, appeared before Chief Justice Tierney. Mr. Topazio and the assistant district attorney, reached an agreed-upon disposition of the several charges against Ms. Stacy.

The tape of the proceedings of November 10, 1989 before Chief Justice Tierney has been reviewed. The defendant admitted to sufficient facts for a finding of guilty. The assistant district attorney presented the Commonwealth's recommendations to Chief Justice Tierney as 18 months probation

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188 Mr. Topazio shares office space with Mr. DiMasi but is not employed by him. Mr. Topazio did work for Mr. DiMasi on a case-by-case basis and was paid either hourly or by the case.

and 14 days of in-patient treatment. [189] Mr. Topazio urged the Court to adopt the Commonwealth's recommendations and gave a brief summary of Ms. Stacy's background and present status. Chief Justice Tierney adopted the joint recommendations of the Commonwealth and the defendant and imposed the sentence jointly recommended. This included a concurrent period of probation for the OUI second offense and operating after revocation. As to the remaining charges, Chief Justice Tierney found the defendant guilty and placed them on file. The proceedings concluded. Chief Justice Tierney's daily trial notes confirm that the recommendation was joint.

The sentence received for OUI second offense was no different than what some other BMC judges may have been expected to give. The imposition of a period of probation on the operating after revocation charge, concurrent with the period given on the OUI second offense, is not an extraordinary disposition. Finally, the findings of guilty and the filing of the related lesser charges is not uncommon at the BMC or in other courts.

The fact that Ms. Stacy admitted to sufficient facts, and that the Commonwealth and Mr. Topazio agreed upon the disposition and sentence, made the police officer's presence in court

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189 The District Attorney's Daily Report form lists the recommendation as "2 years probation" but on the tape, the assistant district attorney clearly announces 18 months as the recommended probationary time.

unnecessary. It would be surmise and conjecture to predict what would have occurred if an actual trial was to take place, and the officer was not present. The notation on the court papers that there was a "trial" on November 10, 1988 is consistent with the practice in the BMC at the time, as described earlier, of lumping admissions with jury-waived trials for descriptive purposes on the docket. Finally, the review of the case gives no indication that Sergeant Scarpa was "set up" in any way.

The review of the case reveals no impropriety on the part of Chief Justice Tierney or any other person.

12. Commonwealth v. Thomas M. Maguire
BMC Docket No.871353

This case was commented upon in the Globe series on September 26, 1990. The Globe reported that the defendant, a lawyer, was charged with OUI third offense as a result of an incident occurring in Quincy in May, 1986. It was reported that in March, 1987 the defendant, who also had an OUI second offense pending, was sentenced on the OUI second offense in the West Roxbury District Court to thirty (30) days in jail but that sentence was suspended so long as he stayed at a hospital for two weeks for treatment. It was reported that on the OUI third offense defendant was ordered to spend sixty (60) days in jail but the OUI third offense was transferred to the BMC jury session where it was tried before Judge Hurley, jury-waived, "a move to put the outcome in Hurley's hands." The Globe further reported that Judge Hurley "completely undid the work of the original judge" by finding the defendant guilty of only so much of the complaint that alleged a first offense. The Globe commented that no tape of the proceedings could be found. The defendant was reportedly represented by Attorney George V. Kenneally, Jr.

Much effort was expended during this inquiry in an attempt to unravel the series of events surrounding this case. The case arose out of an incident occurring on May 24, 1986 in Quincy resulting in an MDC police officer arresting Mr. Maguire for

OUI.[190] A complaint charging OUI first offense issued from the Quincy District Court on May 27, 1986 and the defendant was arraigned the same day.[191] The defendant claimed a jury trial in the first instance and the matter was removed to the jury-of-six session in Norfolk County at the Dedham District Court. During this time the defendant also had another case, an OUI second offense, pending before the West Roxbury District Court, which case arose out of an arrest on April 14, 1986. On July 28, 1986 the defendant appeared at the jury-of-six session, Norfolk County at the Dedham District Court on the May 24, 1986 offense. On that day he was represented by Attorney George V. Kenneally, Jr. Mr. Kenneally presented a motion on July 28, 1986, requesting that the Norfolk County case (the May 24, 1986 offense) be consolidated with the case pending before the West Roxbury District Court (April 14, 1986 offense) and transferred the West Roxbury court.[192] The motion bore signatures of assistant district attorneys from both Suffolk County and Norfolk County. The motion having been allowed, the matter was

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190 Mr. Maguire is an attorney and was from 1980 to 1983 an employee in the Clerk's Office for Civil Business of the BMC.

191 The defendant was also charged with speeding, operating a motor vehicle without registration in his possession, operating a motor vehicle without a license and having an open container with an alcohol beverage in his possession.

192 See Rule 9(a)(4), Mass. R. Crim. P.

transferred to the West Roxbury District Court, and on August 4, 1986 a new complaint was issued from that court and the defendant arraigned on the same day. The charges were the same as they originally had been in the Quincy District Court. On August 28, 1986 the complaint (the May 24, 1986 offense) was amended in the West Roxbury District Court so as to allege OUI third offense. On March 5, 1987 the case arising out of the April 14, 1986 offense (OUI second offense, docket #8606CR4929) and the case arising out of the May 24, 1986 offense (OUI third offense, docket #86-06CR9727)were tried in the West Roxbury District Court. Mr. Kenneally represented the defendant in both cases. The defendant admitted to sufficient facts for a finding of guilty on both cases. On the OUI second offense (the April 14, 1986 offense), Judge Paul Murphy, in the West Roxbury District Court, found the defendant guilty and sentenced him to thirty (30) days in the House of Correction, sentence suspended and the defendant placed on probation. He was ordered to a 14-day inpatient hospitalization and a two-year loss of license.[193] The defendant did not appeal that finding. On the OUI third offense (the May 24, 1986 offense) which had been transferred from the

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193 Two other lesser charges, operating a motor vehicle without a license and going through a red light, were filed after a finding of guilty.
Also Mr. Maguire testified that the 14-day inpatient confinement was satisfied due to the fact that he was completing a voluntary 30 day inpatient alcohol treatment program which ended about the first week in March, 1986.

jury-of-six session in Norfolk County to the West Roxbury District Court, the defendant was found guilty, sentenced to sixty (60) days in the House of Correction and his license was suspended for a period of five (5) years.[194] The defendant appealed the convictions arising out of the May 24, 1986 offenses. The case was then transferred to the BMC jury-of-six session and scheduled for a first appearance date for March 19, 1987. This date was set by the West Roxbury District Court. The BMC case file bears a date stamp indicating that the papers were received at the BMC from the West Roxbury District Court on March 16, 1987.

On March 19, 1987 the defendant appeared in the jury-of-six assignment session. Chief Justice Tierney was sitting on that day. The docket indicates that the defendant was in court and that he was represented by Attorney Kenneally. The docket also indicates that the matter was continued to March 20, 1987, with a further notation "plea." The inference from the docket entry is that the defendant would plead guilty or admit to sufficient facts on the following day. Since, on March 19, 1987 the case

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194 On the lesser charges of speeding, operating without a license, operating without registration in his possession, and operating a motor vehicle while drinking an alcoholic beverage the defendant was found guilty.

was called for a first appearance no police were present.[195] The tape for March 19, 1987 was reviewed. The tape reveals that the first time the case was called the defendant was defaulted. At the next reference to the case, Assistant District Attorney Steven M. Foley answered saying that he had heard from Mr. Kenneally who would be late because he was at a funeral. Also, at this time, the defendant was present. The next reference to the case involves an exchange between Chief Justice Tierney and the defendant. Chief Justice Tierney asked if Mr. Kenneally had arrived yet and was told that he had not. Chief Justice Tierney then offered to continue the matter to another date (it was not to be tried on March 19 in any event) and the defendant was heard to ask for permission to make a telephone call. There is no further reference to the Maguire case on the tape for March 19, 1987.

Mr. Joseph Kelly testified that on March 19, 1987 he was employed by the Suffolk County District Attorney's office as a "court liaison in the BMC jury session, Room 371."[196] On March 19 it was Mr. Kelly's duty to keep a list of cases called to determine the date to which they were continued and to note any

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195 The BMC case file refers to a "Pre-Trial Conference" date of March 19, 1987. For a period of time BMC first appearances were called "Pre-Trial Conference" dates.

196 Mr. Kelly is now an attorney and employed as an Assistant District Attorney, Suffolk County.

cases that were disposed. The list is printed in advance but some cases are added in handwriting after the list is made up. The March 19, 1987 list indicates the Maguire case, having been added in handwriting, as a matter on for first appearance and Mr. Kenneally as defense counsel. There is a notation that the defendant was defaulted and that is crossed out and a further notation that it was continued for "one day." There is nothing written indicating who the assistant district attorney assigned to the case was and the chances were that there had been no such assignment made by March 19. Mr. Kelly testified that it was not unusual for any assistant district attorney who would have been in that session to have taken over answering for the Commonwealth on the case.

On the following day, Friday, March 20, 1987 the case was on the list in the BMC jury-of-six assignment session. On that day Judge Hurley was in the assignment session.[197] The list kept by Mr. Kelly on March 20th has the Maguire matter added in handwriting and indicates the defendant's attorney as Mr. Kenneally. The assistant district attorney assigned to the case is listed as "Gottshalk." There is also a further note, "F-S". Mr. Kelly testified that those notations were in his handwriting

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197 Records show that Chief Justice Tierney was in the assignment session from March 2, 1987 to March 19, 1987. Judge Hurley came to the assignment session on March 20, 1987, and remained there through the following week at which time Chief Justice Tierney returned.

and they meant that the assistant district attorney assigned to the case was Bonita Gottshalk who was, at the time, an assistant district attorney, Suffolk County and the notation "F-S" meant that the case was "finished and settled." Mr. Kelly had no independent memory of that day or that case. As was the practice he assigned Ms. Gottshalk to the case by making the notation on the list because there had been no previous assignment made. When that occurred, he would assign an assistant district attorney; assignments being made in alphabetical order. He testified that he would not, however, generally have advised Ms. Gottshalk at the time that she was so assigned. He also testified that if the matter was to be disposed of in that session any assistant district attorney available might be the one to handle the matter.

The BMC case file indicates that on March 20, 1987 the defendant was in court represented by Attorney Kenneally. There is a stamp indicating the printed notation, "Defendant requests trial without jury. Jury waiver filed after hearing. Court accepts defendants waiver of jury trial. Jury waived trial." There is a further notation "found guilty as to so much that alleges first offense." The sentence was that the defendant was to attend AA four times a week. There was also a loss of license ordered. Judge Hurley made the finding and entered the order on the case. The effect of the finding was to reduce the OUI third offense to an OUI first offense.

The tape for the assignment session for March 20, 1987 was located and the entire day's proceedings reviewed. The tape reveals that the Maguire case was called but no voice is heard to answer either for the defendant or the Commonwealth. In fact, the tape reveals that when the case was called, a "click" is heard immediately thereafter, signifying that the tape recording device was turned off. After the "click" other cases are called and the tape for the rest of the day does not reveal any further mention of the Maguire case. The finding made here is that the case was disposed of while the tape recorder was off.

The District Attorney's file was obtained. It shows that Assistant District Attorney Sheila Tracy had been assigned to the case. Following receipt of the file testimony was taken from several present and past assistant district attorneys (Mrs. Tracy, Ms. Gottschalk, and Mr. Foley) and administrative personnel in the District Attorney's office to determine who may have represented the Commonwealth in the Maguire case on March 20, 1987. Ms. Tracy testified that she received the file after March 20, 1987 and did not handle the case. In fact, she made a note on the file that she was not present when the case was tried. She testified that she made this note when checking the BMC docket to determine what had occurred on March 20, 1987. Neither Ms. Gottschalk nor Mr. Foley had any memory of handling

the case nor do their names appear on the District Attorney's file.[198]

No determination could be made by the District Attorney's Office nor by this administrative inquiry as to who represented the Commonwealth on March 20, 1987 in the Maguire case.

When Mr. Kenneally was questioned concerning this case he stated that the matter went before Judge Hurley who "took it as a first offense." When it was pointed out that this was a charge of OUI third offense his answer was "I don't think they were convictions" but rather continuances without a finding. On further questioning Mr. Kenneally agreed that a continuance without a finding in an OUI case could be deemed a prior conviction. Upon further questioning Mr. Kenneally stated that as he recalls it was not charged as a third offense. Mr. Kenneally testified that defendant pled guilty to OUI first offense, "If I remember right." Upon being asked if the district attorney agreed, his answer was that as he recalls "he didn't object." However, he had no memory as to who the assistant district attorney was. Mr. Kenneally also testified

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198 A thorough search was conducted on behalf of the Special Master and also by the District Attorney's office for the District Attorney's Daily Report form. It was not found.
Another interesting feature of this case is that, although a BMC probation file was created (according to a card that was found), it could not be located for this inquiry. The courtroom probation officer had no memory of this matter.

that he had no memory as to how this case ended up as an OUI first offense after a plea of guilty but that he pled guilty to OUI first offense. He further testified that "I don't know why it was in West Roxbury. I don't recall the darn thing that way." With regard to the continuance from March 19 to March 20, Mr. Keanneally testified that it could have been that he couldn't have been there on the 19th and that perhaps the next day was a Friday. He usually likes to handle matters on a Friday.[199]

Finally, Mr. Maguire himself was questioned. He has no reliable memory as to what occurred. He did, however, state that the case disposition resulted from an admission to sufficient facts for a finding of guilty. Little else of value could be determined from him including whether or not his admission was to a first or subsequent OUI offense.

Exactly what occurred in the courtroom on March 20, 1987 could not be determined either from the several witnesses questioned or the documentary material reviewed. As a result of the investigation made during this inquiry and as summarized above, a finding is made that the tape recording device was intentionally shut off so as to avoid the proceedings from being recorded. This was Judge Hurley's responsibility. Shutting off

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199 He stated that Fridays are the best day for him to appear on cases because of his office schedule. March 20, 1987 was a Friday.

the tape recording device was improper and the resulting disposition of this case has the appearance of impropriety.

13. The Steele Cases

Three cases covered by the Globe series involve one defendant, Walter E. Steele, Jr., who is the son of a Superior Court Judge. Each of the three cases is set out and is described separately.

a. Commonwealth v. Walter E. Steele, Jr.
(BMC Docket No. 86-6417)

Walter E. Steele, Jr. was charged with OUI second offense. The matter arose out of an incident occurring in Dorchester on October 28, 1986. The charge was originally brought in the Dorchester District Court, and the defendant claimed trial by jury in the first instance. The matter was then removed to the BMC jury-of-six session, where it was tried before Judge Hurley, jury-waived, on January 30, 1987 and the defendant found not guilty. The defendant was represented by Attorney Henry A. Cashman from the office of Attorney Thomas E. Finnerty. Representing the Commonwealth was Assistant District Attorney, Stephen M. Foley.

The Globe reported on this case on September 25, 1990. Briefly, the Globe set forth that the defendant was seen to go through a red light at 12:10 a.m., and according to the police officer, defendant's "eyes were red and glassy," he failed a sobriety test "staggering and straying from the straight line"

and was found to have a blood alcohol level of .20. The story also revealed that prior to the trial the defendant had admitted to sufficient facts for a finding of guilty. The story also stated that Mr. Foley "...did not utter a peep of protest" after the Judge's finding the defendant not guilty.

It was also stated that Mr. Foley had left the District Attorney's office at some time subsequent to the trial of the case, joining the office of Thomas E. Finnerty, Jr.

A tape of the proceeding was obtained and reviewed. In addition, counsel involved with the case were questioned. The trial tape disclosed the following: that Judge Hurley was informed at the beginning of the case that the defendant admitted to sufficient facts for a finding of guilty; that the police officer testified that he saw the defendant proceed through a red light and make a left turn into a gas station, whereupon the officer activated his blue light and followed; that upon approaching the defendant, the officer detected an odor of alcohol, and observed the defendant's eyes to be red and glassy; the officer asked the defendant to get out of the vehicle and upon proceeding to the cruiser, the defendant staggered; the officer then administered a heel-to-toe field sobriety test which the defendant failed; the officer also noted slurred speech; and the defendant was then taken to the station and administered a breathalzyer and registered a reading of .20. Consistent with the fact that the defendant had admitted to sufficient facts for

a finding of guilty, neither counsel asked questions, nor was any comment made. Judge Hurley then announced that the test of the "Connolly" case had not been met and found the defendant not guilty of the OUI charge.[200] Following the finding, neither counsel made any comment.

Mr. Foley testified, during this inquiry, that Judge Hurley held a conference preceding the trial, and at that conference, defense counsel, Mr. Cashman, indicated that the defendant would admit to sufficient facts for a finding of guilty. Mr. Foley also testified that very often in such a case, the Assistant District Attorney would read the police report into the record for the purpose of demonstrating that there were sufficient facts to warrant a finding of guilty. In this case the alternate, and probably the better procedure, was used of having one of the police officers testify. Mr. Foley testified that prior to the actual proceeding, he had written a note on his file indicating that the disposition was that the matter was continued without a finding for one year, the defendant ordered to attend an alcohol program and a loss of license for 30 days. That would have been consistent with the Court's finding facts sufficient for a

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200 "The Commonwealth must prove beyond a reasonable doubt that the defendant's consumption of alcohol diminished the defendant's ability to operate a motor vehicle safely. The Commonwealth need not prove that the defendant actually drove in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely." Commonwealth v. Connolly, 394 Mass. 169, 172-173 (1985).

finding of guilty and imposing the usual disposition in a case of this sort. In fact, Mr. Foley indicated that he was prepared to recommend disposition. After Judge Hurley made the finding of not guilty, Mr. Foley crossed out the expected recommendation as he had written it and inserted the not guilty finding. Mr. Foley stated that he did not say anything when Judge Hurley made the finding because there was nothing that he could have done about it.

Mr. Foley's explanation for Judge Hurley's action was that Judge Hurley believed that the Connolly case stood for the proposition that the Commonwealth was required to prove operation of a motor vehicle in an impaired fashion and that going through a red light did not indicate impairment. Mr. Foley stated that this was not his reading of Connolly and that he had told that to Judge Hurley on more than one occasion.

Mr. Cashman testified that a conference was held in this case at his request. The reason he asked for a conference was that he believed it was likely that it was going to be "an admission of some sort, and I wanted to run it by a judge to see...what disposition I could get." Mr. Cashman testified that he wanted to take that action because he believed that the government had a strong case. He testified that when he requested a conference, he knew he had a good chance of being sent to Judge Hurley because Judge Hurley was conferencing cases that day. Mr. Cashman testified that during the conference,

Judge Hurley stated "admit him," but Mr. Cashman didn't know exactly what that meant. Mr. Cashman testified that "it meant either he was going to listen to the evidence and decide whether or not there was sufficient evidence to find him guilty and if so, my impression was that he was going to put him in a program." Mr. Cashman testified that the Judge would find the defendant guilty on the admission, continue the matter without a finding for one year, order the defendant into an alcohol treatment program and suspend his license for the statutory period. Mr. Cashman further testified that he had no explanation for what occurred, but that "The Judge gave an explanation, it was not what I expected to happen."

Mr. Foley first had conversation about leaving the District Attorney's office and going to Mr. Finnerty's office about July of 1988. He actually began work there in September 1988. There is no evidence that there had been any discussion about joining Mr. Finnerty's office prior to July 1988.

There appears to be no reasonable explanation as to how a finding of not guilty could result in this case, having in mind the defendant's admission to sufficient facts for a finding of guilty, the testimony of the officer concerning his observations and most importantly, the results of the breathalyzer. The finding was so contrary to the facts and the law as to give the appearance of impropriety in the circumstances of the case.

b. Commonwealth v. Walter E. Steele, Jr.
(BMC Docket Nos. 88-7170, 71)

Mr. Steele was charged with OUI second offense, and operating without a license. The matter arose out of an incident occurring on July 30, 1988 in Charlestown. The case originated in the Charlestown District Court, and the defendant claimed trial by jury in the first instance, and the matter was transferred to the jury-of-six session in the BMC, where it was tried, jury-waived, on December 22, 1988 before Judge Pino. The defendant was represented by Attorney George V. Kenneally, Jr.

On September 25, 1990, the Globe reported on the case saying that "Kenneally waived a jury trial and resolved the case before Judge Pino." The Globe went on further to comment that "Captive to the facts and the law on second drunken driving offenses, Pino ordered Steele held for the minimum 14 days - not in jail but in alcohol rehabilitation treatment at the Middlesex County Hospital." Further, the Globe commented that Judge Pino took the "unusual action" of ordering the case sealed.

The BMC docket in this case indicates that on the OUI charge, the defendant pled guilty and that Judge Pino found the defendant guilty after his plea, ordered probation for a period of two years, 14 day in-patient alcohol treatment at Middlesex Hospital, Waltham, a $300 fine and loss of license. This was by no means an unusual disposition and, although it conformed to the minimum mandatory sentence, many other judges would probably have

ordered the same disposition. It should also be noted that the District Attorney's records indicate that the Judge's sentence on the OUI offense was in accordance with the recommendation made by the Assistant District Attorney handling the case. However, contrary to the BMC docket entry, the District Attorney's file indicated that the finding of guilty resulted from a jury-waived trial, rather than a plea of guilty.

The docket did indicate a jury-waived trial, on the second charge of operating without a valid license, and a notation that the defendant was acquitted. It appears that the license had expired. There may very well have been a good reason for acquitting the defendant for the license violtion; however, since there was no tape recording of the trial, the reason for the defendant's acquittal is left to conjecture. Judge Pino's improper practice of not recording cases has prevented a full review of the proceedings.

With reference to Judge Pino's order that the record be sealed,[201] it is in accordance with the practice followed by some other judges of the BMC who feel that sealing of records is a matter of no great consequence. This is a practice that should be discouraged, except in the unusual case.

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201 Apparently, although the record was ordered sealed, the Clerk's office failed to follow through, and the docket was made available to the Globe.

In this case, the only finding of impropriety is Judge Pino's failure to have the matter recorded.

c. Commonwealth v. Walter E. Steele, Jr.
(BMC Docket No. 89-2711)

The Globe reported on this case on September 25, 1990. According to the Globe story, the defendant was apprehended on January 17, 1989 after his license was suspended as a result of the OUI conviction on December 22, 1988. The story reported that at the trial, the arresting officer had with him a certified copy of the OUI license revocation, that the defendant's counsel, William Bulger, Jr., pointed out to the Court that the charge did not allege that the defendant's license was revoked on account of OUI and therefore, there was no requirement that the mandatory 60-day jail sentence be imposed. It was also mentioned that the trial judge, Chief Justice Tierney, asked the Assistant District Attorney, John Canavan if he agreed to that and "Without mentioning the certified record showing why the defendant's license was revoked or arguing that Bulger's point was technical, the prosecutor went along" by informing the trial judge that "Count A [operating after revocation of license] does not require the mandatory sentence of 60 days. The way Count A is written it does not specify that it was an 'operating under the influence offense.'" The story did state, however, that Mr. Canavan recommended to the trial judge that he sentence the defendant to 60 days in jail but that the trial judge ruled "quickly," ignored

the prosecutor's recommendation and continued the matter without a finding.

The case originated in the Charlestown District Court, and the defendant claimed trial by jury in the first instance. The case was then transferred to the BMC jury-of-six session where it was tried, jury-waived, on September 11, 1989 before Chief Justice Tierney. The original Complaint charged the defendant with operating a motor vehicle after his right to operate had been revoked in violation of G. L. c. 90, §23.[202] The defendant was also charged with two other offenses, operating an unregistered motor vehicle and operating an uninsured motor vehicle. The complaint (which was never amended) did not specify that the revocation was on account of an alcohol-related offense. In fact, the defendant's right to operate a motor vehicle had been revoked as a result of the December 22, 1988 conviction for OUI which, if the matter had been properly charged, would have subjected the defendant to at least the minimum mandatory 60 day jail sentence.

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202 G.L. c. 90, §23 provides, in an unnumbered first paragraph that operating a motor vehicle after suspension or revocation of license shall be punished (for the first offense) by a fine of not less than $50 nor more than $100 or by imprisonment for not more than ten days or both. The second unnumbered paragraph of Section 23 provides that if a license to operate a motor vehicle has been suspended or revoked on account of an alchol-related driving offense, it shall be punished by a fine of not less than $1,000 nor more than $10,000 and by imprisonment for not less than 60 days, nor more than 2 1/2 years.

The defendant was represented at the trial by William M. Bulger, Jr., and the Commonwealth was represented by Assistant District Attorney John A. Canavan. Mr. Canavan testified as part of this inquiry that he saw the file for the first time the evening before the trial. No one had spoken to him about the case, and he does not believe that anyone else in the District Attorney's Office had been contacted. When he reviewed the file Mr. Canavan discovered certified copies of the revocation showing why the license had been revoked. The file also indicated that the defendant's license had been revoked on account of the OUI offense but that when the complaint was drawn in the Charlestown District Court, it was not charged that way.

The District Attorney's file indicated that when the case was called on July 12, 1989 (and continued), the assistant district attorney made a note that a certified copy of the revocation would be ordered, and that was done. The file also indicated on July 12, 1989 that the trooper would get a copy of the certificate for the next appearance. The file contained no notation concerning the necessity for an amendment or a new complaint.

Mr. Canavan testified that on the day of the trial he spoke to Attorney Bulger who indicated that the matter would be tried on "some sort of admission." Based on the way the complaint was drawn, Mr. Canavan did not believe that the mandatory sentence was applicable and both counsel discussed the fact that there

would not be an agreed recommendation. Mr. Canavan believed, incorrectly, at the time of the trial, that the Court had the authority to impose a 60 day jail sentence, although it was not mandatory. In fact, Mr. Canavan told Mr. Bulger before the trial that he was going to recommend 60 days in the House of Correction. However, Mr. Bulger testified that he had checked the statute and knew that unless the offense was charged as an OUI revocation, the court could not impose that sentence. In fact, the maximum sentence as the matter was charged would have been 10 days in jail, but no mandatory minimum jail sentence. Attorney Bulger also spoke to the arresting officer in order to find out whether or not there were any aggravating circumstances surrounding the arrest. He was informed that the defendant, when arrested, was cooperative. Mr. Bulger also informed Mr. Canavan that the defendant would admit to sufficient facts for a finding of guilty.

The case was called and a conference was requested. Chief Justice Tierney held a side bar conference and during that conference was made aware of the fact that the defendant's license had been revoked because of an alcohol-related driving offense. The Court was also informed that the case would be tried as an admission. Mr. Canavan agreed, at the side bar conference, that because of the pleadings, a conviction would not require the mandatory 60 day jail sentence. Mr. Canavan did, however, mistakenly believe, and so informed the Judge, that the

60-day sentence could be imposed in the Judge's discretion. Mr. Bulger stated that he believed that the Judge could not impose such a sentence, even as a matter of discretion. Both Chief Justice Tierney and Mr. Bulger testified that Chief Justice Tierney offered to give Mr. Canavan the opportunity to go back to the Charlestown District Court and amend the Complaint so as to specify the reason for the license revocation.[203] According to Chief Justice Tierney and Mr. Bulger, Mr. Canavan declined the offer and opted instead to go forward. Mr. Canavan did not recall having been given that opportunity but stated that if he had, he would still have decided to go forward. The tape recording of the side bar discussions was found. Unfortunately, the tape was of poor quality and much of the side bar conference was unintelligible. Even with special enhancement, the conversation was mostly inaudible. From what little could be heard, there is confirmation of a conference which took place at the side bar and a discussion concerning the Complaint not alleging "operating under the influence." Most of the other discussion however, is inaudible.

The police officer took the stand and recounted the events and stated that he had certified copies of the revocation. At

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203 Chief Justice Tierney also testified that he gave Mr. Canavan the opportunity of amending the Complaint at that point. Mr. Bulger testified that if that were attempted, he would have objected because of Rule 4 of the Mass. R. Crim. P. See also G.L. C.218,§ 35A.

the end of the evidence, Chief Justice Tierney asked Assistant District Attorney Canavan for his recommendation on disposition. Mr. Canavan replied, "60 days House of Correction, committed." Mr. Bulger argued on behalf of the defendant that the case be continued without a finding stating that the Complaint does not allege that the revocation was OUI-related. Chief Justice Tierney formally asked Mr. Canavan if he agreed that there was no mandatory sentence, and Mr. Canavan agreed that "The mandatory 60 days, the way Count A is written, it does not specify that it was an OUI-related offense." The answer was a confirmation of what had occurred previously at the side bar conference.

Mr. Bulger further argued that, in view of all the circumstances in the case, appropriate disposition would be to continue the matter without a finding.

After listening to the arguments and representations of counsel, Chief Justice Tierney ordered that the charges of driving after revocation of a license and driving an uninsured motor vehicle be continued without a finding to March 14, 1990. The defendant was found responsible as to the civil infraction, driving an unregistered motor vehicle, and fined.

The controversy surrounding this case was precipitated by the fact that the matter was originally undercharged, and no effort was ever made to amend or to seek a new complaint. The assistant district attorney admitted to the Judge on two occasions that because of the pleadings, a mandatory 60-day

sentence was not required. In fact, the assistant district attorney's recommendation that Chief Justice Tierney impose a 60-day sentence as a matter of discretion, would have resulted in an illegal sentence had he followed that request.

The posture of the case was that Chief Justice Tierney had before him a case where the defendant was operating a motor vehicle after suspension or revocation of a license with no mandatory sentence required. Chief Justice Tierney exercised his discretion and although one may disagree with the sentence imposed, it fell within the his discretion and no improper conduct is demonstrated.

14. Commonwealth v. Joseph A. Grigalunas
(BMC Docket No. 87-7155)

This case was addressed in the Globe series on September 23, 1990. The case was not referred to by the defendant's name, due to the fact that the Globe had received the information under the "privacy-for-criminals law"[204] with the restriction that the defendant's name not be used in the story. The Globe article related that the defendant was represented by Attorney Michael F. Flaherty and the case was heard before Chief Justice Tierney. The Globe stated that the defendant was charged with OUI second offense, but that the second offense portion of the charge was dismissed at the request of Assistant District Attorney Mary

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204 G.L. c. 6, §§167-178.

Orfanello, who told the Judge that the Probation Department had no criminal record for the defendant. The story then stated that "with the most serious part of the charge thus disposed, the prosecutor presented a barely rudimentary case: one witness who testified for less than two minutes, Flaherty went on to win an easy 'not guilty' verdict." The story also stated that probation records obtained by the Globe indicated that the defendant had a prior OUI conviction, and that this information was "easily available to all courts," and "a flip through the municipal court's own case file, which was on Tierney's bench that day, shows the Complaint from Dorchester District Court, which lists the date, verdict and sentence of the man's prior drunken driving conviction."

The defendant was originally charged with OUI first offense, the Complaint originating in the Dorchester District Court. The defendant was also charged with a civil motor vehicle infraction, going through a red light. The case grew out of an incident occurring on December 4, 1987. The matter was then amended while still in the Dorchester District Court to reflect an OUI second offense. A jury trial was claimed in the first instance, and the matter transferred to the BMC jury-of-six session where it was tried before Chief Justice Tierney, jury-waived, on March 30, 1988. As set out in the Globe story, Attorney Flaherty represented the defendant, and the Commonwealth was represented by Assistant District Attorney Mary Orfanello.

The trial tape of the proceeding was available and reviewed. At the outset, Assistant District Attorney Orfanello stated that after checking with probation, charging as a second offense appeared to have been an error because probation reported no prior record. At that point, Chief Justice Tierney said, "Alright, let's just check it this moment." Chief Justice Tierney then directed the following question to the probation officer: "Mr. Probation Officer, is there any record with this gentlemen?" The probation officer then responded, "Your Honor, according to his record, he had no record." At that point, Ms. Orfanello moved to dismiss so much of the Complaint as charged second offense and proceeded on the basis of an OUI first offense. The Court allowed the motion, and the trial proceeded.

The one and only witness for the Commonwealth was the arresting MDC police officer. He was on duty, in a cruiser, on December 4, 1987 at approximately 8:15 p.m. at Neponset Circle when he saw the defendant go through a red light at a high rate of speed. The officer, with his partner accompanying him in the cruiser, gave chase on the expressway and clocked the defendant for about two miles at a speed of 75-80 m.p.h. The defendant was stopped and asked to get out of his vehicle. The officer observed the defendant to be unsteady on his feet as he went over to the curb. The officer was then asked by Ms. Orfanello whether he observed a field sobriety test, "walking toe-to-toe," to which the officer responded in the affirmative. The witness's partner

demonstrated a test for the defendant, and the witness observed the defendant "not following instructions and not doing walking toe-to-toe, unsteady on his feet." The officer was then asked if he made any other observations regarding the defendant's physical condition, and he responded that he detected an odor of alcohol. The officer then testified at the trial that he formed an opinion that the defendant was under the influence and placed the defendant under arrest. There was no cross-examination of the police officer.

The defendant took the stand on his own behalf and testified that that evening, he was in the company of his girlfriend, that he went through the light, but it was yellow at the time. He testified that he got onto the expressway, saw the police lights flashing behind him and got off at the next exit. He testified that his speed was "over the speed limit." He testified that he did not force anyone to put on their brakes, nor did his girlfriend complain about his driving. He testified at the trial that he thought he was being stopped for speeding, but he was asked to walk to the back of the car for a sobriety test. At the trial he described the heel-to-toe test and other tests (inaudible on the tape) and the fact that he was asked to recite the alphabet. He stated at the trial that he completed all the tests and went up to the letter "V" in the alphabet, at which time he told the officer that he was sober. He stated at the trial that he did have a drink that evening, and he informed the

officer he had one "White Russian" about 45 minutes to an hour prior to the event. The defendant, on cross-examination, was asked if his girlfriend was in court, and he responded in the negative.

The police report which is contained in the District Attorney's file, indicated that the defendant's vehicle was seen going through a red light, that he was pursued by the officers who had activated their blue lights, that the defendant was clocked at speeds of 75-80 m.p.h. for approximately two miles before finally stopping, that upon being stopped, the defendant stated that he was just trying to "impress the lady in the vehicle," that field sobriety tests were conducted consisting of reciting the alphabet, counting backwards from 30 and walking a straight line heel-to-toe. The report further stated that the defendant failed all tests administered and that further, his eyes were observed to be glassy and that there was a strong odor of alcohol on his breath. The report stated that upon being asked if he had been drinking, the defendant responded that he had one "White Russian." It should be noted that although the various field sobriety tests administered were set out in the report, the results were not documented. Also of interest, is the fact that the officer testified at the trial that he had been an MDC police officer just over a year. There was no determination made during this inquiry as to why the other officer did not testify or whether he was at the trial. It was

apparent that Ms. Orfanello did not question the officer at the trial as to all of the field sobriety tests administered.

At the conclusion of the evidence, the defendant was found not guilty on the OUI offense and responsible for the civil infraction, going through a red light, and was fined. In light of the evidence before the Court, the finding of not guilty was not unreasonable.

Inquiry was made into the reasons for the reduction in the charge from OUI second to OUI first offense. The trial tape clearly indicates that the matter was first raised in open court by Assistant District Attorney Mary Orfanello. The Court properly granted the motion to reduce the charge to OUI first offense in view of the representation of Ms. Orfanello and the probation officer. Mr. Flaherty testified during this inquiry that he believed that the first OUI offense was more than six years prior to the date of trial.[205] Mr. Flaherty testified that when he arrived at the trial session, he checked the defendant's probation card which showed no prior record. He was also aware of the fact that Ms. Orfanello did not have a certified copy of the prior OUI offense. Mr. Flaherty made no misrepresentations, however, either to Ms. Orfanello or to the Court.

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205 Actually, the arrest was more than six years prior to the trial, but because of defaults, the conviction was within the six-year period.

The probation officer, Mr. Nazzareno Modica, testified during the inquiry concerning this matter. Mr. Modica was the probation officer in the session where this case was tried. He brought with him the entire BMC probation file on the defendant. At the time this case was tried, it was the practice of the probation officer to obtain the defendant's record in either one of two ways. One way would be to send a form over from the BMC Probation Office to the Office of the Commissioner of Probation (which was in a different building) and have it returned with the information on the defendant's record. The other method was for the probation officer to call the Commissioner's Office to obtain the defendant's record. In this case Mr. Modica called the afternoon prior to the trial or on the morning of the trial. Mr. Modica testified that when he called, he was informed that the defendant had no record, and he so noted that on the defendant's BMC probation card. It was apparently that card that Mr. Flaherty saw on the day of trial. Since this case originated in the Dorchester District Court, the Probation Department in that court also would have checked the defendant's record. The BMC file indicates that the Dorchester District Court was also informed that the defendant had no record. Although mistakes in transmission of information to court probation officers from the Commissioner's Office were not uncommon, in this case both the probation officer in Dorchester and the probation officer in the BMC were told that the defendant had no record. Part of the

explanation may lie in the spelling of the defendant's name. The file indicates the defendant's name was spelled several different ways. This is a probable explanation for what occurred in this case. This is a mistake that would unlikely occur today since the records have been computerized,[206] thereby doing away with the cumbersome method used at the time this case was tried and assuring more accuracy.

The Globe correctly reported that the case file in the BMC did have a reference to the prior OUI conviction indicating the defendant had been arrested on October 19, 1981 and the case disposed of on July 24, 1984 with a guilty finding. It is unlikely, however, that the probation officer would have checked the court case file. Only selective portions of the file were sent to the BMC Probation Department, not including the portion that set out, in this case, the prior conviction. However, the Globe's reference to the fact that the defendant's criminal record would have been before Judge Tierney is not correct. The case file is in the Clerk's possession in the courtroom. Chief Justice Tierney testified that when the case is called, it is his practice to receive from the Clerk the Complaint, which sets out the charges. If any other portion of the case file became material, for example prior docket entries, he would ask the

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206 The system now has the capacity to search for spelling variation and also to search by social security number and date of birth.

Clerk for the relevant material, but it would not be his practice to review the entire case file. In this case, Chief Justice Tierney testified that he relied entirely on the probation officer for the information. The tape confirms this.

There was nothing inappropriate in the action by Chief Justice Tierney in allowing the motion to reduce the charge from OUI second offense to an OUI first offense. The mistake made at trial was precipitated by transmission of incorrect information, an occurrence that would be less likely today with computerized probation records. The problems encounted by the District Attorney's office in the preparation of cases was also a factor in the result of this case.[207]

15. The Weber Cases

Dr. Alfred Weber is a physician practicing in Boston. He was involved in a series of three cases as a defendant in the BMC. Events occurring during the latter two of those cases became, during this administrative inquiry, subject of concern. The first case, although not raising issue for concern, is set out for background and completeness.

Dr. Weber was represented in all three cases by Attorney George V. Kenneally, Jr. According to Dr. Weber, he first met Attorney Kenneally after his first OUI arrest on January 29, 1987. According to Dr. Weber, he met Mr. Kenneally when he

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207 See Section II. 14 of this report dealing with the operation of the District Attorney's office.

needed a lawyer, and as a result of a research associate's recommendation. According to Mr. Kenneally, he had been acquainted with Dr. Weber for a number of years before the arrest.

a. Commonwealth v. Alfred Weber
(BMC Docket No. 87-5665)

Dr. Weber was arrested on January 29, 1987 on the Expressway in South Boston by the State Police. He was charged with OUI first offense and failure to stay in marked lanes. He appeared in the South Boston District Court with Mr. Kenneally, where he claimed a first instance jury trial. The case was transferred to the BMC jury trial session. The Assistant District Attorney, Mary Orfanello, was assigned to the case. On November 13, 1987, Judge Bakas heard the matter, jury waived, and continued the case without a finding for one year on the condition that Dr. Weber attend the ASAP program, "or some other alcohol treatment program" and, in addition, imposed a license loss of 45 days. This type of disposition was not uncommon in the BMC for OUI first offense cases.[208] However, because Dr. Weber was ordered to an alcohol treatment program, this disposition would count as a first offense if he was charged with another OUI offense within six years.

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208 See discussion in Section II. 15 on OUI cases.

b. Commonwealth v. Albert Weber
(BMC Docket No. 88-3407)

On May 7, 1988, Dr. Weber was arrested by Sergeant Thomas Quirk of the MDC Police on the Southeast Expressway at Neponset. He was charged with OUI and a failure to stay within marked lanes.

Dr. Weber was initially charged in the Dorchester District Court with OUI and a civil motor vehicle infraction (failing to stay within marked lanes). On May 10, 1988, the Complaint was amended to charge OUI second offense. Also, on that date, Mr. Kenneally appeared for Dr. Weber at the Dorchester District Court and claimed a first instance jury trial in the BMC.

The charge in the BMC was OUI second offense. The case was assigned to September 16, 1988 for trial. On September 16, 1988, both Mr. Kenneally and Dr. Weber were in court before Chief Justice Tierney. The case was continued to December 20, 1988 and Chief Justice Tierney ordered the entry "to go to Bakas." On September 16, 1988, Chief Justice Tierney was in the assignment session and Judge Bakas was in one of the jury trial sessions. Chief Justice Tierney explained that "he can only assume" the reason for the note was that Judge Bakas conferenced the case, and when it came back to the Assignment Session, it came with a request from Judge Bakas that it be sent to him. The District Attorney's file on the Weber case for the September 16, 1988 contains the notation that the case was handled by Ms. Orfanello before Judge Bakas; that the case was continued as the defendant

was completing a "program"; that there would be a "plea", and the case continued for hearing to December 20, 1988.[209]

On December 20, 1988, the case was again called for trial in the Assignment Session, on which date Judge Pino was sitting. Mr. Kenneally represented Dr. Weber and Ms. Orfanello represented the Commonwealth. Both Sergeant Quirk and Sergeant Warren Yee (the MDC police booking officer) were present at the BMC by 9:00 a.m. for the start of the court day. The court papers for December 20, 1988 indicate the case was dismissed for want of prosecution by Judge Pino at 11:35 a.m. because there were no police present.[210] Both Sergeants Yee and Quirk submitted court appearance cards for pay purposes for December 20, 1988. The cards for each of them indicated that they left the BMC at 11:00 a.m. Each card was signed by Ms. Orfanello. Both cards indicated the disposition of the Weber case as "guilty." Neither Sergeant Quirk nor Sergeant Yee had a specific recollection of the events of December 20, 1988. Both testified that Assistant District Attorney Orfanello's signature on their court appearance cards indicated that she had given them authorization to leave. Sergeants Quirk and Yee testified that they would not leave

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209 The note on the file states, "Hrg 9-16-88/ADA: MO/Judge: Bakas/Defense Attorney: Kenneally/Remarks-Reason: 379 cont'd - D completing program - will be pleas - HRG/Next continuance date: 12-20-88."

210 The docket entry reads: "DIC[Defendant in Court] Court B + C/Dismissed for Want of Prosecution/No Police 11:35 a.m./Pino, J."

without authorization. They both testified that before leaving the courthouse, they had the information that caused them to write "guilty" on their cards. Sergeant Quirk testified that he may have placed the "guilty" on his card after the left the courthouse. Sergeant Yee testified that he placed the "guilty" on his card before he left and before it was signed by Ms. Orfanello. Both Sergeants Quirk and Yee testified that they could not specifically remember Ms. Orfanello telling them that the Weber case was going to be a "guilty". They testified that the only way that they would get information about the disposition of a case was either to be present at disposition or for the assistant district attorney to tell them what the disposition was going to be, such as an admission or guilty plea. Ms. Orfanello testified that she signed this type of card only to indicate the officers' presence at court and not to indicate the time the officer left or to give him authority to leave. She had no memory of signing Quirk and Yee's cards on December 20, 1988.

Sergeant Quirk had another case on for trial in the BMC jury trial session that day, Commonwealth v. James Dillard, Docket No. 85-2466-7. This case was also handled by Ms. Orfanello, and disposed of by Judge Pino in the Assignment Session. Ms. Orfanello noted on the District Attorney's file on the Dillard case that Sergeant Quirk was present, and the case was held for

second call conference.[211] The Dillard court papers indicate a guilty plea and sentence by Judge Pino on December 20, 1988.

Ms. Orfanello's notes in the Weber file and on the Daily Report form for December 20, 1988 state that Sergeant Quirk was present but not when the case was called.[212]

Ms. Orfanello testified that she did not specifically recall handling a case with a defendant named Alfred Weber. She did recall handling a case where a physician was arrested by Sergeant Quirk that was dismissed. According to her testimony, in the case she recalls, Sergeant Quirk was "...available and was in the court, was in the court building--and I believe that was reported to the court--but was not in the courtroom at the time that the case was called. I don't know anything else about it. I don't recall anything else. I don't recall the specifics of the case."

Ms. Orfanello testified, in the case that she recalled, regarding what she told Judge Pino concerning Sergeant Quirk's availability:

> Q. But did you tell the judge that the Sergeant was available?
> A. That's my best memory.
> Q. And available means available to testify?
> A. That's correct. [Testimony of December 7, 1990]

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211 The actual entry reads, ""Sgt. Quirk here/conf./2C [Second call]".

212 The Daily Report states, "P.O. not here @ time case called/Did appear/Letter sent." The note on the file states "Sgt. Q. here - but not here @ time cased called DISM"

* * * *

Q. In your prior testimony you said that you believe that you told Judge Pino that Sergeant Quirk was available?
A. What my recollection is I -- I really would like to make clear that I don't have a specific memory of this particular case. I believe in November you asked me if I remembered the case, and I believe what I told you was -- and this is my memory -- that I remembered a case involving Sergeant Quirk and a doctor because I think at that time you had told me that the defendant in the case you were interested in was a doctor. I remembered a case involving Sergeant Quirk and a doctor where the sergeant to my best recollection was in the building but not in the courtroom at the time the case was called. I don't know that this is the case. I didn't know then, and I don't know now that this is that case. My memory is -- I don't remember.
I don't remember so I can't tell you whether I did or did not tell the judge that. I don't have a present memory of that. To the best of my memory it would have been my normal course to indicate that the officer was available if that is, in fact, what my file indicated. And my memory of that incident involving Sergeant Quirk and a doctor -- again, I don't know if this is the case -- to the best of my recollection I apprised the court of that, but I am not a hundred percent certain but that is my best memory. [Testimony of December 20, 1990]

Ms. Orfanello testified that she had no explanation for the notations on Sergeants Quirk and Yee's Court Appearance cards of "guilty" with her signature.

Dr. Weber testified during this inquiry that before December 20, 1988, he had seen a psychiatrist at Massachusetts General Hospital, about four times for the purpose of the court proceedings. Dr. Weber testified he went to see the psychiatrist

as a result of a conversation with Mr. Kenneally. He did not continue to see the psychiatrist after the proceedings. He brought with him to the BMC on December 20, 1988 a letter from the psychiatrist which he gave to Mr. Kenneally. He did not see Mr. Kenneally give the letter to the judge. Dr. Weber does not remember what occurred on December 20, 1988. He does remember that the case was dismissed. He assumed the reason was "insufficient evidence." Mr. Kenneally, however, testified during this inquiry that the case against Dr. Weber appeared strong.[213]

Mr. Kenneally testified that he gave the psychiatrist's letter to Judge Pino. A copy of the psychiatrist's letter for this inquiry was produced for this inquiry by Mr. Kenneally. The letter was dated December 16, 1988 and was addressed to the BMC Probation Officer. It stated:

> Please be advised that I have agreed to see Dr. Alfred Weber for ten psychiatric sessions, as a result of his having been stopped for driving under the influence of alcohol on May 28th of this year. To date, I have seen him five times (December 2, 6, 9, 12 and 16).

Mr. Kenneally testified regarding the dismissal:

> Q. Tell me what happened.
> A. I think I had -- That's the second offense?
> Q. Second offense.
> A. I had him working already with a psychiatrist down at the Mass. General, and I presented all that, whatever the man's

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213 A review of the police report confirms Mr. Kenneally's assessment.

name is I don't recall, but I did have him working with him, and went back to Judge Pino and we had it dismissed then.

Q. But it says for want of prosecution.

A. I don't recall that that was really the reason, but I showed where he had had some drinking discussions with this psychiatrist, he had worked with him. I think I had a letter from the psychiatrist....

* * * *

Q. Your memory then is that you showed Judge Pino a letter from a psychiatrist that he was involved in an alcohol program. Correct?

A. That's correct.

Q. I assume also you told him that he was a physician of some prominence?

A. Yes. I had a letter on that, too.

Q. And that he was going to continue on with an alcohol program because you told Judge Pino he had an alcohol problem?

A. That's correct.

Q. The case was dismissed, the docket marked for want of prosecution, but that the real reason was because you asked Judge Pino to do it?

A. That's correct.

Q. That was based upon the fact that this was a physician of prominence?

A. I'm sure it was.

* * * *

Q. It was also based on the fact that the letter from the psychiatrist stated, the one you showed the judge, that the patient, your client, Dr. Weber, would continue the treatment?

A. That's correct. That's what I thought, yes.

* * * *

Q. Did you discuss with the judge dismissing it on the record for want of prosecution?

A. I don't recall saying that or making that suggestion.

Q. But you understood that is what took place?

A. That could have been what was the reason, but I don't know that as -- I don't believe

> that was the case. I just believe that the -- I was getting a break for this man because of his position and because he was going to this psychiatrist, that's what I was doing.

Mr. Kenneally testified that he did not recall whether or not the police were present.

Judge Pino had no specific recollection of this Weber case nor did he have any note of it. He testified that he would not dismiss a case for want of prosecution if the police officer was in the building. However, he testified that if the police officer left the courthouse, he would dismiss the case. He denied he was told the officer was in the building. He did not recall Mr. Kenneally giving him a letter from a psychiatrist and would not have gone into the "rest" of the case, such as the defendant's psychiatric treatment, if the case was dismissed for want of prosecution. He denied ever dismissing a case to give the defendant a "break."

Sergeants Quirk and Yee did not learn that the case was dismissed for want of prosecution until they were contacted during this inquiry.

Ms. Orfanello's note, set forth above, stating, "letter sent" refers to the practice of the District Attorney's office of sending a letter to the commanding officer for any case dismissed because of non-attendance of police officer.[214] The letter

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214 See discussion in Section II. 14 of this report concerning the District Attorney's office.

informs the commanding officer of the dismissal and its reason and suggests that the matter be evaluated to determine whether to seek a new complaint. Officers Quirk and Yee were not informed of the receipt of such a letter.[215]

The tape recording (Tape #8554) for the Assignment Session of December 20, 1988 was reviewed. The quality is such that certain key portions are difficult to understand; however, some important parts are clear. The attention of the Court is directed to the Weber case three times during the morning and twice on the Dillard case. The following is the order of the various calls: Dillard first call; Weber first call; Dillard second call; Weber second call; Weber third call. Attached to this report is a transcript of the audible portions of the three calls of the Weber case. (Appendix H) The reasonable inferences that can be drawn are that on the first call, Dr. Weber was not present and that Judge Pino told Mr. Kenneally that he had better get Dr. Weber in Court or else he would "screw up the works." Judge Pino said that he would be quitting at 12:30 or 12:45 that day but that he would hold the case from day-to-day. On the second call, Judge Pino asked Mr. Kenneally if he has conferenced the Weber case with Judge Bakas; Mr. Kenneally answered that he

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215 An effort was made to determine if the letter was received at the Old Colony Station, but the results were inconclusive due to a change in command.

had not, and Judge Pino said that he would keep the case because Judge Bakas was busy. On the third call, Judge Pino asked for the police officer (Quirk) and Ms. Orfanello answered that he had been there and that he could not have "gone far"; Judge Pino told Mr. Kenneally that Dr. Weber had better straighten himself out, and Mr. Kenneally replied that he had been in treatment for this. Judge Pino thereupon dismissed the case for want of prosecution. It is not clear what else (other than the portion transcribed in the Appendix) Ms. Orfanello said to Judge Pino during the conversation at the third call.

A review of the morning's proceedings before the Weber third call indicates that Judge Pino, as assignment judge, had filled the available trial sessions and already had continued more than three cases to new dates because of lack of available trial sessions. Therefore, had Quirk and Yee been present at 11:35 a.m., there would have been no place other than the Assignment Session to send the Weber case for trial, if it were, in fact, to be a trial. In fact, the tape shows that the call of the list continued even after the dismissal.

With respect to the case of Commonwealth v. Weber BMC Docket No. 88-3407, there was impropriety on the part of Judge Pino in dismissing the case for want of prosecution. The factors making Judge Pino's actions improper are: dismissal of the case for want of prosecution when the trial sessions were full and the assignment session (where Judge Pino was sitting) was to close at

12:30-12:45; the fact that the officer had been present some time before; Judge Pino's remarks; what he was told by Ms. Orfanello; and the inference (as corroborated by Mr. Kenneally himself) that the case was dismissed for some reason other than as stated.

A finding is made here of improper conduct with respect to Attorney Mary Orfanello. This misconduct involved: causing the police officers (Sergeants Quirk and Yee) to leave the courthouse by releasing them before the third call with the information that the case would result in a guilty finding; and then later (even if she had discharged them in error, thinking that there was going to be a guilty plea rather than for the purpose of prejudicing the Commonwealth's case), failing to have accurately reported what she had done when that information was requested by the Court.

c. Commonwealth v. Alfred Weber
(BMC Docket Nos. 253214 and 256390)

Dr. Weber was arrested by Officer Mark DiBona of the Amtrak Police on December 17, 1989 on the bus ramp near South Station on Atlantic Avenue. He was charged with OUI in the BMC Primary Court. Subsequently, a new complaint issued charging him with OUI second offense. The case was scheduled for trial for March 23, 1990. Dr. Weber was again represented by Mr. Kenneally.

Attorney Francis X. Orfanello, Executive Secretary to the Administrative Justice of the Superior Court, called Judge Dermot Meagher at the BMC. Judge Meagher knew Mr. Orfanello through Judge Meagher's father. Judge Meagher testified concerning the telephone call as follows:

> He called me on the phone sometime prior to March 23rd, it was a Friday, of this year. I think the week before. I have a slight memory, but I can't be certain, that he said, "Are you going to be in room thus and such on next week"? And I didn't know what the room number was, and I said I didn't know. And he then said -- I looked on the list because I keep my list right next to me. He said, "May I come down and talk to you?" It was in the morning. I said, well, what I had to do. I said, "I don't think I can talk to you now, but why don't we have lunch?"

Judge Meagher testified that by the end of the conversation, he did not know the purpose of the call or the proposed meeting.

Judge Meagher testified that he met Mr. Orfanello that day in the lobby of the Old Suffolk County Courthouse. They went to One Beacon Street where, as Judge Meagher described, they engaged in small talk. Mr. Orfanello handed Judge Meagher an advance sheet of a recent case with the remark that it might be of interest to him. Judge Meagher testified that:

> Later in the course of the conversation he said -- I believe this is what he said -- "George Kenneally, a supporter of yours, is coming before you on -- has a case before you in the second session on Friday, March 23rd involving a doctor who has been arrested for -- was charged with a second driving under." I was taken back by this reference and didn't say anything for a while, and then I said -- I decided I was going to not acknowledge that I knew -- that I suspected what he was trying to say to me. So I said, "You know what I would do if I were a lawyer in those cases? I would get my guy into a twenty-eight day program and have it all accomplished by the time he appeared in court. Have him go through this program because some judges allow the twenty-eight day program in lieu of the fourteen day hospitalization." And that was really the end of that.

Judge Meagher testified that there was no other discussion regarding the matter until after the two walked back from One Beacon Street to the Suffolk County Courthouse. Judge Meagher testified that in the lobby of the Old Suffolk County Courthouse, Mr. Orfanello said, "Well, I had a message, and I delivered the message. " The name of the case was not mentioned during Mr. Orfanello's contact with Judge Meagher. Judge Meagher reported some of the conversation to a another BMC judge and worked out an arrangement with that judge to be available to hear the case if needed on March 23, 1990 so that he would not have to hear it.

Mr. Kenneally testified during this inquiry that Mr. Orfanello had asked him (Mr. Kenneally) to speak to members of Governor's Council in support[216] of Judge Meagher's nomination to the bench at the time when the nomination was before the Council. Mr. Kenneally testified that, in fact, he spoke to five or six councillors on Judge Meagher's behalf. Mr. Kenneally testified that Judge Meagher never spoke to him for any reason. Judge Meagher testified that he had never seen Mr. Kenneally.

Mr. Orfanello[217], when present for the purpose of giving

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216 Judge Meagher was sworn in as Associate Justice, BMC on May 3, 1989.

217 Attorney Frank Orfanello was, during this inquiry, Executive Secretary to the Chief Justice of the Superior Court. He worked in the Suffolk County Superior Clerk's Office from 1950 to 1971 and then worked for the Chief Justice of the Superior Court until court reorganization in 1978, when he gained his present title. He became a member of the Massachusetts bar in 1952.

testimony during this inquiry, refused to testify regarding this subject on account of his "state and federal rights against self-incrimination."

Mr. Kenneally testified that during the week before March 23, 1990 (meaning March 19 to 23, 1990), he spoke with Mr. Orfanello about some bills that were pending. Mr. Kenneally testified that he said to Mr. Orfanello, "By the way, I'm going to see your friend," referring to Judge Dermot Meagher. Mr. Orfanello responded, "You'll be alright with him." Mr. Kenneally told Mr. Orfanello Dr. Weber's name and that it was a "driving under" case. Mr. Kenneally responded to Mr. Orfanello by stating kiddingly, "He doesn't even know who I am." Before the conversation, Mr. Kenneally had checked to find out who was sitting in the session in which the Weber case was scheduled. He denied, however, calling the BMC to see who would be sitting.

Mr. Kenneally testified that on March 23, 1990, he continued the case. His explanation was:

> ...I had thought about the whole thing. I'd never done that before, never mentioned to somebody that I was going to have a case before him. So I decided to continue it anyway.
> Q. Why did you continue it?
> A. Because I didn't want to -- Brand new judge, and I shouldn't have said anything to Frank Orfanello, and I just wanted to put it over.

Mr. Kenneally denied that he intended that Mr. Orfanello speak with Judge Meagher. He also denied being told by Mr. Orfanello that he (Orfanello) had spoken with Judge Meagher. However, Mr. Kenneally did testify that after speaking with Mr. Orfanello, that he thought that Mr. Orfanello might speak to Judge Meagher about this case.

On March 23, 1990, Mr. Kenneally and an assistant district attorney appeared in front of Judge Meagher in the Primary Court Second Session. Mr. Kenneally testified that he told the assistant district attorney before the Weber case was called, that he would like the case continued because Dr. Weber had to go out of town that day. The assistant district attorney testified that he had to get a continuance because his witness, Officer DiBona, was in school in Washington. Both attorneys appeared before Judge Meagher. The assistant district attorney told the court that the officer was in school and out of town. Judge Meagher continued the case to May 18, 1990. The date was suggested by Mr. Kenneally. Mr. Kenneally testified that he suggested the date because it was a Friday, and Fridays were convenient for him in terms of his duties as Senate Counsel. Mr. Kenneally denied any advance knowledge concerning who was going to be sitting in the Primary Court, Second Session on May 18, 1990.

On May 18, 1990, the Weber case tried before Judge Pino sitting in the primary court, Second Session. A transcript of

the trial from the official tape recording is attached. (Appendix I). One witness, Officer DiBona, testified. Officer Lee, DiBona's partner at the time Dr. Weber was arrested, was in court but did not testify. Judge Pino asked several asked several questions, as set out in the transcript. Judge Pino's questions were in the nature of cross-examination of Officer DiBona. Judge Pino, in fact, interrupted the witness and took over the questioning. The questions, his manner of questioning, and his comments gave the appearance of his being a partisan. After the testimony, Judge Pino found Dr. Weber not guilty and lectured him on the dangers of drinking and driving. Although Judge Pino stated that he had a reasonable doubt about Dr. Weber's guilt, he clearly thought Dr. Weber had been drinking when he was stopped. Mr. Kenneally denied ever speaking to Judge Pino about the Weber case in advance of the trial.

A finding is made here that Judge Pino's conduct in this case creates the appearance of impropriety by his having conducted the trial in such a manner as to create the appearance of preferential treatment for the defendant or his counsel.

A finding is made that Attorney Francis X. Orfanello acted improperly in his contact with Judge Meagher, and that that contact was in an attempt to influence the outcome of the case of Commonwealth v. Weber BMC Docket No. 256390. A further finding is made that Attorney George V. Kenneally, Jr. participated and encouraged Mr. Orfanello in the contact with Judge Meagher, and to this extent, Mr. Kenneally's conduct was also improper.

Judge Meagher was made an unwilling participant in this unfortunate matter. He had been a judge for less than a year when the uninvited contact was made. There is no suggestion that his conduct as a judge was influenced. He also arranged to have another judge hear the case. However, following the contact, he had a duty to initiate appropriate investigative or disciplinary measures, which he failed to do.[218]

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218 Canon 3 (B)(3)(b), Code of Judicial Conduct, Supreme Judicial Court Rule 3:09 and Matter of DeSaulnier (No. 4), 360 Mass. 787,813 (1972).

VII.

CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

The Order of the Supreme Judicial Court, which is the basis for this administrative inquiry, focused on "alleged improprieties with respect to preferential treatment of attorneys by certain justices of the Boston Municipal Court." In conducting this inquiry, it was necessary to delve into the workings of the BMC, including its administration and day-to-day functioning. Some of the problems uncovered relate to, or were made possible by, conditions that are systemic, and therefore, those issues are addressed in these Conclusions and Recommendations.

Each BMC case identified and described in the Globe series as an example of, or creating an inference of, preferential treatment or other impropriety is covered in this section under the judge or attorney in question, only if the case involves a finding or indication of misconduct. Cases involving a finding or indication of misconduct uncovered during this administrative inquiry but not referenced in the Globe series, are handled in the same way.

It is stressed here that there were no indications or findings of impropriety or misconduct regarding any BMC judge, except as stated in this report.

2. The Big Picture

The BMC is isolated from the rest of the trial court and has developed its own culture. Although the Court has district court jurisdiction, it does not operate as part of the district court system. There is no rotation of judges into or out of the BMC, and its systems and procedures have become inbred. There is an absence of coordinated management existing between the BMC and the district court system. Personnel, budget and other resource needs are not well coordinated with other parts of the judicial system. A management system that results in the court becoming a more integral part of the trial court system is required. A simple example illustrates this point. The statutory scheme, together with its implementation, has resulted in eight district courts, which are part of one department, feeding a large amount of court business (jury-of-six cases) into the BMC, which is another, but co-equal department. No one manager coordinates the two. As a result of lack of central management, many problems covered in this report have resulted. For example, cases from the eight district courts that send their cases to the BMC jury-of-six session have been funneled into a complement of 11 judges and then, for most of the period covered by this inquiry, those cases were handled by a select few Judges. During that period,

any attorney or defendant could transfer any criminal case from any district court in Suffolk County to the BMC with the expectation that one of a few judges would likely preside over the case. The potential for abuse in this system has been demonstrated. The fact that the current Chief Justice has established a rotation system reduces, but cannot eliminate, the problem and cannot prevent the recurrence of the problem on its former scale. Some may say that there exists in the Office of the Chief Administrative Justice statutory machinery to exert management control and provide the needed coordination between departments. However, the mechanism, as presently constituted, as far as transfer of judicial personnel is concerned, is cumbersome and requires the coordination and cooperation of two co-equal trial court departments, each with its own Chief Justice. With regard to non-judicial personnel, coordination and transfer requires express approval of an administrator, other than the Chief Administrative Justice.

The recommendation here is that the BMC be merged into the District Court Department of the Trial Court. In addition, in order to improve the overall management of the court system, there should be a mechanism which vests more flexibility in that management. This should include the ability of the court system to have the management flexibility to transfer and/or consolidate resources, including judicial and non-judicial personnel, funds and facilities to where they are most needed and can be most efficiently employed.

The court system should have the ability to consolidate, eliminate or create judicial districts that conform to changes in caseload, demographics and available resources.

If all the above changes should occur, it would be expected that many of the problems identified in this report would not recur. However, until those changes occur, there are some specific recommendations that are made here with regard to the operation of the BMC jury-of-six session.

3. Recommendations Specific to the Operation of the BMC

Improved case load management is required in the jury-of-six session. The present system provides an environment where there is much uncertainty surrounding whether or not events will occur as scheduled. Continuances are frequent, and the parties most often do not know if one will be requested or granted until the day of trial. This absence of certainty and predictability feeds on itself, in turn creating additional problems, with the result that confidence in the judicial system is weakened. For example, the turmoil invites shortcuts, inappropriate informality, unnecessary appearances by witness, defendants and counsel and the waste of precious judicial resources. It also invites the opportunity for abuse.

However, considering the volume of business handled, absolute certainty is unlikely to be achieved, and some flexibility must be designed into the system to take care of truly unavoidable circumstances. But, substantial certainty and general predictability are achievable.

The recommendation here is that there be more meaningful judge involvement and responsibility for the scheduling process. This may be accomplished in a number of different ways. Some of those include individual or modified calendaring, meaningful pre-trial conferences with judicial intervention, setting of a schedule with time limits for the completion of pre-trial matters, the scheduling of a meaningful number of cases for trial so that parties will come to realize that the case will be tried when scheduled, and the setting aside of separate times for motions and/or conferences. This list could go on; but, the necessity is that the case flow management of the jury-of-six session be improved.

Another recommendation is the rotation of judges into and out of the BMC. This would promote a healthy exposure to new and different ways of handling issues of administration, case flow management and issues involving specific types of cases. Also, it would hopefully promote a spirit of unified purpose among the courts having district court jurisdiction.

Although there is a proposal to hold some jury-of-six sessions in other district courts in Suffolk County, the recommendation made here is that those steps be implemented as soon as possible.

Other more specific issues, including those dealing with facilities, are referred to in the body of this report and are better addressed by the appropriate administrators.

4. Legislators Practicing Before the Court

Much media attention has been focused on attorneys, legislators and attorneys employed by the legislature practicing before the courts. A concern is whether or not those that are directly involved with the legislature and the process of legislation should be practicing before the courts at the same time that their legislative actions or duties affect salary and working conditions of the judicial branch. The argument that experienced, practicing lawyers, as legislators, bring their knowledge of, and experience in, the court system, to the legislative process in dealing with judicial issues is an appealing one. However, it is not without a high price. The public has a right to absolute faith in both the legislative and judicial process. When officers of one branch appear before officers of another and each has an interest in how the other's judgment is exercised, an appearance of conflict of interest exists. The relationship does not create the presumption of wrongdoing; but, the relationship creates unavoidable suspicion and appearance of conflict of interest. It is the fact that that suspicion cannot be avoided. It is therefore, a recommendation made here that attorney legislators and attorneys employed by the legislature be limited or prohibited from appearing before the trial courts of this Commonwealth.

5. Recommendations Pertaining to Findings or Indications of Misconduct.

There were several findings or indications of misconduct referred to in the body of this report. In reaching those conclusions, the Special Master is mindful of the fact that the parties involved have not had an opportunity to confront and cross-examine witnesses, or to conduct a defense to specific charges. Those persons should be entitled to respond to specific charges and to participate with counsel in a forum where those charges are required to be proven before any formal and final disciplinary action is taken. With that in mind, the following recommendations are made with reference to the persons named.

a. Judge John A. Pino

It is recommended that a copy of this report, together with the relevant portions of the transcribed testimony, exhibits and supporting material be forwarded to the Commission on Judicial Conduct for the institution of appropriate proceedings against Judge Pino with regard to his conduct, as follows:

(1) Intentionally failing to record proceedings as required by law; Code of Judicial Conduct, Canons 1,2(A), 3(A)(1);

(2) Intentionally failing to conduct colloquies with defendants, as required by law concerning waivers of the right to trial by jury, pleas of guilty and admissions to sufficient facts for a finding of guilty; Code of Judicial Conduct, Canons 1,2(A), 3(A)(1);

(3) Failing to conduct proceedings in an orderly, fair and public manner; Code of Judicial Conduct, Canons 1,2(A), 3(A)(1)(3);

(4) Improperly dismissing the case of Commonwealth v. George V. Kenneally, III (BMC Docket No. 89-6907) for the purpose of giving preferential treatment to the defendant or his counsel; Code of Judicial Conduct, Canons 1,2(A), 3(A)(1);

(5) Improperly dismissing the case of Commonwealth v. Alfred Weber (BMC Docket No. 88-3407) for the purpose of giving preferential treatment to the defendant or his counsel; Code of Judicial Conduct, Canons 1, 2(A), 3(A)(1);

(6) Conducting the trial in the case of Commonwealth v. Alfred Weber (BMC Docket No. 256390) in such a way as to give the appearance of preferential treatment to the defendant or his counsel; Code of Judicial Conduct, Canons 1, 2(A),3(A)(1).

b. Judge Walter Hurley

It is recommended that a copy of this report, together with the relevant portions of the transcribed testimony, exhibits and supporting material be forwarded to the Commission on Judicial Conduct for the institution of appropriate proceedings against Judge Hurley with regard to his conduct, as follows:

(1) Failing to record proceedings, either intentionally or by neglect, as required by law; Code of Judicial Conduct, Canons 1,2(A), 3(A),(1);

(2) Giving the appearance of impropriety in the case Commonwealth v. Timothy Sheehan (BMC Docket No. 89-5581) by hearing a case submitted on an agreed statement of facts and dismissing it for want of prosecution for lack of police witnesses; Code of Judicial Conduct, Canons 1, 2(A), 3(A)(1);

(3) Acting improperly in the case of Commonwealth v. McDonough (BMC Docket No. 89-5548-49) by conducting a trial in a criminal case and interrogating the defendant, without the presence of counsel for the defendant; Code of Judicial Conduct, Canons 1, 2(A), 3(A)(1), 3(A)(4);

(4) Acting improperly in the case of Commonwealth v. Walter E. Steele, Jr. (BMC Docket No. 86-6417) by making a finding so contrary to the facts and the law, so as to give the appearance of impropriety in the circumstances of the case; Code of Judicial Conduct, Canons 1, 2(A), 3(A)(1);

(5) Acting improperly in the case of Commonwealth v. Thomas M. Maguire, (BMC Docket No. 87-1353) by intentionally failing to record the proceedings, as required by law;

A further recommendation made with regard to Judge Hurley, is that a determination be made that he is disabled, on account of medical reasons, from continued service as a judge; and further that the Commission on Judicial Conduct determine what, if any, relationship existed between Judge Hurley's conduct, as described in this report, and his physical and emotional condition.

c. Judge Dermot Meagher

It is recommended that a copy of this report, together with the relevant portions of the transcribed testimony, exhibits and supporting material be forwarded to the Commission on Judicial Conduct for the institution of appropriate proceedings against Judge Meagher with regard to his conduct, as follows:

In failing to initiate appropriate measures in connection with his contact with Attorney Francis X. Orfanello in March 1990 when Mr. Orfanello attempted, improperly, to influence the outcome of a criminal case pending before the BMC.

d. Attorney Francis X. Orfanello

It is recommended that a copy of this report, together with the relevant portions of the transcribed testimony, exhibits and supporting material be forwarded to the Board of Bar Overseers of the Supreme Judicial Court for the institution of appropriate proceedings against Mr. Orfanello with regard to his conduct, as follows:

Improperly contacting Judge Dermot Meagher of the BMC in an attempt to influence the outcome of the case of Commonwealth v. Weber (BMC Docket No. 256390); Disciplinary Rules 1-102(A),(1),(2),(5),(6), 7-110(B).

e. Attorney Mary A. Orfanello

It is recommended that a copy of this report, together with the relevant portions of the transcribed testiomny, exhibits and supporting material be forwarded to the Board of Bar Overseers of

the Supreme Judicial Court for the institution of appropriate proceedings against Ms. Orfanello with regard to her conduct, as follows:

Acting improperly in the case of Commonwealth v. Alfred Weber (BMC Docket No. 88-3407) by intentionally causing the police officers, who were necessary witnesses, to leave the courthouse before the matter was called for trial either in error or for the purpose of prejudicing the Commmonwealth's case and, if she had discharged them in error, failing to have accurately reported what she had done when the information was requested by the Court. Disciplinary Rules 1-102(A)(1), (2), (4), (5), (6), 7-101(A) (1), (2), (3)

f. Attorney George V. Kenneally, Jr.

It is recommended that a copy of this report, together with the relevant portions of the transcribed testiimony, exhibits and supporting material be forwarded to the Board of Bar Overseers of the Supreme Judicial Court for the institution of appropriate proceedings against Mr. Kenneally with regard to his conduct, as follows:

Improperly participating in and encouraging Attorney Francis X. Orfanello's conduct in contacting Judge Dermot Meagher in an attempt to influence the outcome of the case of Commonwealth v. Weber (BMC Docket No. 256390).

g. Others

In view of the findings made in this report that no misconduct or indications of misconduct exist with reference to any of the actions of Chief Justice William J. Tierney, no action with regard to him is recommended.

In view of the findings in this report that no misconduct or indications of misconduct exist with reference to the actions of Attorneys Salvatore F. DiMasi, Michael LoPresti, Jr., Thomas E. Finnerty, Alfred E. Saggese, Jr., and Michael F. Flaherty, no action with regard to them is recommended. Similarly, no action is recommended regarding any other attorney except as previously mentioned.

Respectfully submitted,

Paul R. Sugarman
Special Master and Commissioner

February 4, 1991